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AS I have strongly recommended Mr. Clark's useful little book of precedents, I may perhaps be allowed to answer some criticisms that have been made upon it and which may perhaps puzzle students. It is the received practice of conveyancers to make the transferror of a mortgaged debt convey 'as mortgagee': Wols. Prec. 280, 1 Prid. 623, 1 K. & E. 218. In a conveyance on sale by mortgagor and mortgagee where the mortgagor conveys as 'beneficial owner' it is not the practice and it would be useless to insert any words of direction by him 'as beneficial owner.' I have never heard it doubted that in a marriage settlement full covenants for title may be implied by the words 'beneficial owner' Wols. & B. 35, Elph. Introd. Conv. 276. The question whether the advancement clause in a settlement should extend to shares taken by appointment is rather vext (see this question discussed 38 Solicitors' Journal, 248); while in 2 K. & E. 461 following 3 Dav. Prec. 159 it is stated that the more correct practice is not to extend it to appointed shares, it is so extended either expressly or by necessary implication in Wols. Prec. 76, 2 Prid. 294, 317.

HOWARD W. ELPHINSTONE.

Mr. George H. Smith of San Francisco, whose Critical History of Modern English Jurisprudence (San Francisco, 1893, 83 pp.) lies before us, appears to think that all English lawyers implicitly accept the whole of Austin's philosophy—if it is a philosophy—of law. We have already hinted on more than one occasion that this is not exactly so, and we beg to repeat that when some of us express opinions inconsistent with Austin's (which Mr. Smith has duly noted) we are quite aware of the inconsistency, and mean thereby to signify that we do not agree with Austin (which natural inference Mr. Smith, we know not why, seems unwilling to draw). Further we do not think it necessary to be constantly contradicting Austin's fallacies in set terms, partly because we do not wish

needlessly to hurt the feelings of any one who still believes in them, but chiefly because we regard Austin's particular form of *Naturrecht* (for *Naturrecht* it is, as Dr. Brunner has pointed out) as already dead and buried for all students who have any sense of history. We welcome Mr. Salmond's fresh and ingenious 'First Principles of Jurisprudence' as a healthy sign of independent life among the younger generation. F. P.

THE SALE OF GOODS ACT, 1893 (56 & 57 Vict. c. 71).—Considering that this is merely a codifying Act, which has been carefully drafted to avoid the introduction of contentious matter, it has been a most unconscionable time in passing. However it is now on the statute book and forms an important step in the codification of contract law. It follows the lines of the Bills of Exchange Act, and is in general clear and concise, including in its scope almost the whole of the rules of law relating to its subject. It was not to be expected that in the present state of Parliamentary business any serious attempt could be made to materially alter the Statute of Frauds, but in its re-enactment several necessary verbal alterations have been made, and the following clause has been added:—'There is an *acceptance* of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.' This disposes of a class of cases of which *Taylor* v. *Smith* ('93, 2 Q. B. 65) was the last reported example. Another controversy which has been set at rest is that aroused by the decision in *Bentley* v. *Vilmont* (12 App. Ca. 471), which Lord Watson declared in his judgment to be an iniquitous result of the Larceny Act. Now, notwithstanding that statute, the property in goods obtained fraudulently from the owner by means not amounting to larceny, does not revest in the original owner 'notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise' 'by reason only of the conviction of the offender.' An innocent purchaser, without notice, who pays cash against the goods, is so far protected.

The Act does not affect the sale of horses: although an attempt was made to draw up a code of rules to supersede the old Acts of Philip and Mary, and of Elizabeth, it came to nothing: a similar fate befell a section abolishing the privilege attaching to sales in market overt, which remains unaltered, but what is exactly market overt is still unsettled, although *Hargreave* v. *Spink* ('92, 1 Q. B. 25) seemed to render some definition necessary. Notwithstanding apparent obstacles, it was found possible to extend the

operation of the Act to Scotland by means of saving clauses and some special provisions, so that we now have the law applicable to all three countries within the four corners of a single statute. The following are unaffected:—bankruptcy, the rules of the common law, including the law merchant (save in so far as they are inconsistent with the express provisions of this Act), and in particular the rules relating to the law of principal and agent, the effect of fraud, misrepresentation, duress, or coercion, mistake or other invalidating cause, bills of sale, mortgages, pledges, charges, &c., and in Scotland the landlord's right of hypothec or sequestration for rent.

Besides the Statute of Frauds (ss. 16 and 17) and Lord Tenterden's Act (s. 7), the following are repealed:—The Brokers Act, the Mercantile Law Amendment (Scotland) Act, 1856, ss. 1–5 (inclusive), and the Mercantile Law Amendment Act, 1856, ss. 1 and 2.

Mr. Gilbert ought to search the law reports for motives for comic operas. The 'Sultan of Johore' or 'The Baker and the Sultan' would, to begin with, be a capital title for a musical performance at the Savoy Theatre. The Sultan's feats in the Law Courts would lend themselves admirably to the treatment in which Mr. Gilbert's genius excels. We have first the worthy and unpretending Albert Baker who sues for the hand of Miss Mighell, obtains her love, and promises her marriage. Then Mr. Baker is the gay deceiver who is pursued by the injured fair into the Law Courts. Her triumph seems certain, when suddenly Albert Baker is transformed into the sovereign prince, the Sultan of Johore, and asserts his immunity from the laws of England. The lady produces the Queen's writ; the Sultan brings out of his pocket a certificate of sovereignty from the Foreign Office. A Court, amid the universal approval of international lawyers, pronounces that it has no jurisdiction over a sovereign. The Sultan is triumphant; the lady loses her case, and, we presume, pays costs. Surely Mr. Gilbert's genius can make something out of these suggestive incidents.

Mighell v. *The Sultan of Johore*, '94, 1 Q. B. (C. A.) 149, though it has its comic side, is a decision of some importance. It brings a whole line of cases to their logical conclusion. It establishes in the most distinct terms the broad principle that the Courts of this country have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction, and that such submission cannot take place until the jurisdiction is invoked. Doubts which might be raised by *Munden* v. *Duke of Brunswick*, 10 Q. B. 656;

Duke of Brunswick v. *King of Hanover*, 6 Beav. 1; 2 H. L. C. 1; and *Wadsworth* v. *Queen of Spain*, 20 L. J. (N. S.) Q. B. 448, or rather by expressions used in the course of these cases, are now set at rest. The Courts have no jurisdiction over a sovereign independent prince either in his public or in his private capacity. *Mighell* v. *Sultan of Johore* in fact simply applies to different circumstances the principle involved, *The Parlement Belge*, 5 P. D. 197.

A curious question of international law still remains open for decision, and is not touched by *Mighell* v. *The Sultan of Johore*, nor by *The Parlement Belge*. What, if any, are the immunities, whilst in England, of an ambassador accredited by a friendly sovereign power, not to the Crown, but to some foreign sovereign? The very general language used by Brett L.J. in *The Parlement Belge*, 5 P. D. 197, 213, and approved by him as Lord Esher in *Mighell* v. *The Sultan of Johore*, suggests that such an ambassador is free from the jurisdiction of our Courts. The suggestion, which probably was not intended, is, it is submitted, erroneous. An ambassador accredited, e. g. by the Tsar to the King of Italy, stands when in England in the same position as any other Russian.

The sole point actually determined by *The Industrie*, '94, P. (C. A.) 58, is that a charterparty for the carriage of goods on board a German ship from one foreign port to another need not necessarily be presumed to be a German contract, and made subject to the law of the flag. Such a contract when made in an English form in England may be an English contract governed by English law.

The decision is of importance as exhibiting in a very strong light two tendencies of English judges when construing a contract as to which one may doubt whether it is or is not made subject to foreign law. The one tendency is to hold that the only principle applicable to the case is that the contract must be construed in accordance with the law to which the parties presumably intended to subject themselves (*Lloyd* v. *Guibert*, L. R. 1 Q. B. 115). The other tendency is to assume, in applying this principle that if the contract was made in, or had any relation to England, the parties intended to subject themselves to English law. The existence of this second tendency or bias on the part of English judges will no doubt be disputed, but to anyone who has carefully examined the line of cases to which *Lloyd* v. *Guibert*, *The August*, '91, P. 328, and *The Industrie* belong, the prevalence of a leaning, possibly not an unreasonable leaning, towards the assumption that English law is the proper law of any contract connected with England, must appear a marked characteristic of English Courts.

South Hetton &c. Co. v. *The North Eastern News Association*, '94, 1 Q. B. (C. A.) 133, determines that an action of libel will lie at the suit of a corporation in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage. This decision will cause surprise to lawyers. It is quite in conformity with the *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, but is noteworthy as carrying out the principle to which the Courts clearly now adhere, that the right of a corporation to sue for a wrong is in general the same as the right of a natural person. The limits to be placed on the application of this rule arise simply from the fact that there are certain things which cannot conceivably be done by a corporation as such. Hence a corporation cannot sue in respect of the imputation of murder or adultery. As a corporation cannot commit these offences, to charge a corporation with them is simply to utter senseless abuse.

To many readers *Bowes & Partners* v. *Press*, '94, 1 Q. B. (C. A.) 202, will prove the most interesting case in the Law Reports for this quarter. It deals with the rights of employers and employed in the case of a strike, and proves that under the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, workmen belonging to a union, who in breach of contract refuse to work with a non-unionist, may be substantially fined. The decision, we venture to say, will commend itself to everyone's good sense. The proper correlative of any man's freedom to enter into a contract is liability to pay damages for the breach of it, and the very considerations which make it economically and politically desirable that workmen should be able both individually and collectively to make any promises they choose, also make it imperative that the breach of such promises should subject them to pecuniary loss. *Pactum serva* is an elementary maxim, but it is a sound and a just one, and like all just rules applies to every class of the community.

In *Synge* v. *Synge*, '94, 1 Q. B. 467, the Court of Appeal has extended the sound and useful rule in *Hochster* v. *De la Tour*, 2 E. & B. 678, 22 L. J. Q. B. 455, that disabling oneself from the future performance of a contract may be treated as an immediate breach, to the case of a man alienating *inter vivos* what he has promised to leave by will. The contract being here in consideration of marriage, the Court intimated that, if asked, it would have decreed specific relief against all persons claiming through the promisor as volunteers. As to the existence of a binding though informal contract the case is a simple application of *Hammersley* v. *De Biel*, 12 Cl. & F. 45.

Readers accustomed to the ways of the Law Reports will see with only moderate surprise that Kay L.J. is represented as sitting alone in the Court of Appeal and as giving judgment on a certain day in January 1874.

Lord Justice Bowen's judgment in *American Must Co.* v. *Hendry* (5 R. 331) carried us back to 'wild times.' We are nearing the twentieth century now, but we still have—such is the continuity of English law—bailiffs scaling walls and assaying windows to effect their raid on the Englishman's castle. In *Long* v. *Clarke* (69 L. T. R. 654) the bailiff had got over the wall of the tenant's back garden by means of a ladder and so through a half-open window at the back of the house. The legality of this was impugned on the strength of *Scott* v. *Buckley* (16 L. T. R. 573), but the Court of Appeal had no difficulty in adopting *Eldridge* v. *Stacey* (15 C. B. N. S. 458) in preference: as Kay J. justly remarked, if you may get in through an upper window by a ladder why not over the wall of the curtilage? In *Lewis* v. *Owen* a few pages further on (69 L. T. R. 861) we have the primitive scene of private war re-enacted—the tenant assaulting the bailiff while getting over a hedge. The County Court has now jurisdiction to fine for this (County Courts Act, 1888, c. 43), and it is satisfactory to know that the jurisdiction is punitive and non-appealable: for this kind of self-help is to be discouraged.

Section 25 of the Companies Act, 1867, is an edge tool, dangerous to play with (*Re Eddystone Marine Insurance Co.* '93, 3 Ch. 9) (C.A.). It does not enable you to allot shares for nothing merely by registering a contract, however honest your intentions may be. 'Meaning,' as Mr. Macey, the parish clerk in Silas Marner, said, 'doesn't go far in these matters. You may mean to stick things together and your glue may be bad, and then where are you?' Where the allottees of these shares were was on the list of contributories. *Browning's case* (10 Times L. R. 274) is the sequel of this transaction. Some of the shares given away under the registered contract had got into the hands of a bona fide holder for value, but unluckily for him the certificates had on the face of them 'Bonus Shares,' and the Court held this enough to fix him with notice that they were unpaid. No satisfactory device for getting round sec. 25 has yet been invented.

Re Low, Bland v. *Low* ('94, 1 Ch. (C. A.) 147) is a very interesting illustration of legal juggling. Take a Scotch judgment debt, statute barred in an English administration and of no value.

Register the judgment under the Judgments Extension Act, 1868, sec. 3. Now remove the hat and the judgment appears as a good claim against the English assets. This surprising transformation results from registration under the terms of the Act. It gives a new cause of action and so rehabilitates the debt. If this is not driving the conventional coach and six through an Act of Parliament, it is certainly circumventing the statutory bar. But one is not sorry to see this technical and sometimes unconscionable defence frustrated occasionally.

Testators must now read up Acts of Parliament very industriously, otherwise they may find their intentions sadly frustrated. This is the moral of *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, '94, 1 Ch. 297 (C. A.). The principle applied by the Court of Appeal is merely the old one that a will speaks as to the property comprised in it as from the testator's death, which is well enough if the language which the will uses is a testator's own and not imputed to him. But when a long and obscure Act of Parliament provides in some belated section that—'horse' in a will shall be deemed to include 'cows,' no one can feel sure of the effect of his testamentary intentions. *Re Bridger* is too suggestive of this. A testator gives all his pure personalty to a charity, and then a Mortmain Act comes and says that pure personalty is to include impure personalty and realty.

Etherley &c. Co. v. *The Auckland District Board*, '94, 1 Q. B. (C. A.) 37, follows *Hill* v. *Thomas*, '93, 2 Q. B. (C. A.) 333. It must now therefore be taken as finally settled, as far as the matter can be decided by the Court of Appeal, that the standard of comparison by which to determine whether traffic is 'extraordinary' within the meaning of the Highways &c. (Amendment) Act, 1878, sec. 23, is the ordinary traffic on the road in question, not that on other roads in the district. Whether this is really the meaning of the Act is at any rate open to doubt. The principle adopted by the Court of Appeal leads to the result that no traffic can in the long run be 'extraordinary,' for when it becomes habitual it must be the ordinary traffic carried over a particular road.

'Estoppels' said Lord Bramwell 'are odious.' Certainly they are not easy of application. *Foster* v. *Tyne Pontoon & Dry Docks Co.* (63 L. J. Q. B. 50) is an instance. It was a case of fraud by the secretary of a company, a fraud which it must be admitted had the simplicity of true genius. Meeting a member of the company the secretary said to him, 'Would you like some more of that stock?' The member said he would, and paid £300, and the

secretary sent him a transfer. Then he took more stock and received more transfers. The defect of all these transactions was that the transferor was a fictitious person. The secretary could not register or furnish certificates—it would have led to detection—but he did what he could, he sent dividend warrants on the stock in the name of the company to the stockholder, and so 'made his mind easy.' This was relied on as an estoppel against the company. But the Court on the authority of *Simm* v. *Anglo-American Telegraph Co.* held that the warrants did not amount to a representation of the transferee's title. Sending dividend warrants however is a stronger thing than the merely ministerial registration in *Simm* v. *Anglo-American Telegraph Co.* (5 Q. B. Div. 216). Moreover the recent case of *Balkis* v. *Consolidated Co.* (69 L. T. R. 598) seems to carry the principle of estoppel a good deal further than *Simm* v. *Anglo-American Telegraph Co.*

The unity of husband and wife may still have a mystical reality, but as a legal doctrine it is in ruins. We have now got so far that a husband is not 'interested' in a business carried on by his wife (*Smith* v. *Hancock*, '94, 1 Ch. 209), a highly convenient doctrine for a husband who wishes to evade a covenant he has entered into against rival trading. You have only to get your wife to set up business in her own name, write circulars *for her to* 'old friends' and so forth. The artifice is too transparent. *Incredulus odi.* But conveyancers will in future have to adapt the form of covenant to meet Kekewich J.'s decision, which in point of law seems right enough.

Bankruptcy is rightly recognized as an invaluable means of getting rid of your liabilities especially now the Legislature has made nearly everything proveable. But there is one liability which even bankruptcy will not extinguish, and that is the liability to maintain a wife. A bankrupt can no more rid himself of this than he can realize his wife as an asset. Hence alimony is not a proveable debt. The Court of Appeal so decided some time ago (*Linton* v. *Linton*, 15 Q. B. Div. 239), and now Kennedy and Vaughan-Williams JJ. have expressed the view that even arrears of alimony due at the date of the receiving order are not proveable (*Re Hawkins, Ex parte Hawkins*, '94, 1 Q. B. 25). This is a very practical question because bankrupts generally manage to have an income, and if they have they must on this very proper conclusion share with their partners for life. Persons about to marry must reckon with this state of the law before they 'venture.'

An equitable tenant for life of the male sex may be let into possession to manage his property on undertakings (*Re Wythes*, '93, 2 Ch. 369). Why not then a young married lady? Chitty J. saw no objection, nay, invested the lady with all the powers of a tenant for life under the Settled Land Acts (*Re Bagot*, '94, 1 Ch. 177). The rich young heiress or widow is a favourite conception of our dramatists and novelists, old and new, and there is no reason why the Lady Olivia should not do quite as well as Sir Toby. French wives are notoriously good at business,—Max O'Rell ascribes the wealth of France to their predominance in the shop and prudence in investing. English women are not much behind in the matter of driving bargains. Granted the capacity, it is an undeniable truth of human nature, that things are never so well looked after as by a person with an interest. Trustees may do their duty, but they cannot feel any burning zeal.

Judicial loyalty too often stereotypes bad law. Happily the bad law embodied in Malins V.-C.'s decision (*Hunt* v. *White*, 37 L. J. Ch. 326)—that covenants for title do not extend to a defect known at the time to the purchaser—seems to have been unknown to the profession, at least it had not got into the text-books, so the Court of Appeal had no scruples in overruling it: *Page* v. *Midland Ry. Co.*, '94, 1 Ch. 11 (C. A.). Malins V.-C.'s decision, if it stood, would destroy nearly the whole value of covenants for title. It is instructive to compare or contrast with *Page* v. *Midland Ry. Co.* the principles laid down by Tindal C.J. in *Margetson* v. *Wright* (5 M. & P. 606) that a person who buys a horse with a warranty of title cannot sue the seller on the warranty for a defect, say of blindness, which he, the buyer, knew of at the time he bought the horse. In the latter case the blindness is an actually existing disparagement of value in the thing sold abating the price; in the former the defect is in the title, not in the thing. It may never affect the purchaser at all, and being fortified by the covenant does not usually abate the price.

Infants have many privileges, and one of them is that if an infant witness in a criminal case breaks the condition of his recognizances with the Crown, his recognizances cannot be estreated being a matter of contract. The practical result of this is that if a witness necessary for a prosecution is an infant, he should be subpœnaed. Then if he disobeys the subpœna he may be attached (*Reg.* v. *Ernest W. Smith*, 17 Cox. C. C. 601).

Ultzen v. *Nicols*, '94, 1 Q. B. 92, may be studied with satisfaction by anyone who dines at eating-houses. The result of the case is that if a customer of such a house gives his coat to a waiter to hang up, and the coat being hung up is stolen, the jury may find the keeper of the house liable in damages for the loss of the coat, and in such a case the verdict which the jury may give they will give. The moral for the customer is that he had better not hang up his coat for himself. Here, as elsewhere, the principle applies, 'Never do for yourself what you can get another person to do for you.'

In Goods of Tamplin, '94, P. 39, is in one sense a mere decision on a point of practice, and the circumstances of the case look at first sight specially complicated; yet, like many other decisions as to points of practice, it in reality determines or affirms a general and simple principle. The principle which the case illustrates is this: that our Courts will not grant probate of a will dealing solely with immoveable property in a foreign country. *In Goods of Tamplin* should be read together with *British South Africa Co.* v. *Companhia de Moçambique*, '93, A. C. 602. The two decisions both exhibit the fixed refusal of our Courts to deal in any way with the determination of rights to foreign land, and this sound resolution, whatever its historical origin, affirms one of the most fundamental principles of private international law, viz. that the Courts of a country ought not to determine matters as to which they cannot give an effective judgment.

Bowen v. *Anderson*, '94, 1 Q. B. 164, with which should be read *Sandford* v. *Clarke*, 21 Q. B. D. 398, and *Jones* v. *Mills*, 10 C. B. N. S. 788, ought to dispel the delusion, which by the way has influenced the whole of our legislation with regard to County Courts, that an unimportant case, that is, a case not involving a claim to heavy damages or to valuable property, must be a simple case. *Bowen* v. *Anderson* is as unimportant a case as one can find. The only practical matter to be determined is whether *A*, who treads on a loose coal-plate, and falls into the hole which it ought to cover, and thereby breaks his leg, can recover damages of probably no great amount from the landlord of the house in front of which the plate stands. The defence of *X* the landlord is in substance that *A*'s remedy (if any) is against *Y* the tenant of the house, and when this question comes to be carefully considered it is found to raise among other points the inquiry, what is the true position of a weekly tenant? Is he a person who takes a house for a week, and to whom, if the tenancy continues, the house is re-let weekly,

or is he a person who takes a house for an indefinite period from week to week, subject to have his tenancy determined by due notice, which may perhaps mean as much as a week's notice? The Queen's Bench Division, represented by Wills J. and Collins J. —than whom it would be difficult to find two more competent lawyers—have now decided, following *Jones* v. *Mills*, that the position of a weekly tenant is that of a tenant who holds for an indefinite period, subject to the determination of his tenancy by reasonable notice to quit. But not more than six years ago, Mr. Justice Wills, as he himself with characteristic and admirable candour points out, decided in effect that in the case of a weekly tenancy a house was re-let to the tenant every week. The right of the plaintiff in *Bowen* v. *Anderson* to recover damages for breaking his leg was therefore found to depend on the answer to a question of law so uncertain that a first-rate lawyer might without discredit give a wrong reply to it. An unimportant case therefore turns out to be a most difficult case.

Bowen v. *Anderson* is interesting from another point of view. The abolition or simplification of forms of pleading has led to an idea that the choice of parties to an action is no longer of any great importance. In one sense this is true. An error as to parties can now in most cases be amended and therefore involves no more than a certain loss to the plaintiff in the matter of costs. Still, that the right plaintiff should direct his action against the right defendant, or, in other words, the choice of parties, must always at bottom be a matter of essential importance. It lies at the very basis of every attempt to enforce a legal right, and the necessity for a right choice cannot be got rid of by any change in the system of pleading. In *Bowen* v. *Anderson* the question to be determined was in reality, who was the proper defendant, was it the landlord *X*, or the tenant *Y*? In other words, the case raised a question as to the selection of parties.

Bond v. *Plumb*, '94, 1 Q. B. 169, is in itself an unimportant decision. It determines that a betting agent who had violated the spirit had also broken the letter of the Betting Act, 1853, 16 & 17 Vict. c. 119. It however reminds us that though his conduct was opposed to the whole spirit of the Betting Act, he would have escaped punishment if it could have been shown that his case did not fall within the exact words of a singularly ill-drawn enactment. We are thus forced, not for the first time, to consider a question which has frequently been raised in these pages. Is it reasonable

that our judges should apply to statutory enactments a system of interpretation far narrower than that which they apply to the interpretation of Common Law maxims? The inquiry deserves a careful answer, for until a satisfactory reply is discovered many lawyers, who are not in the least opposed either to reform or even to innovation, will continue to deprecate the codification of the law. They dread that the broad principles of the common law, when reduced to a statutory form, should be interpreted not in accordance with their spirit, but simply in accordance with their letter.

Does the elector for a particular borough possess a legal right to have a petition presented to the House of Commons by the M.P. for the borough?

Chaffers v. *Goldsmid*, '94, 1 Q. B. 186, answers this question in the negative. The oddity of the thing is that any man with education enough to make the inquiry should have thought that it could seriously be raised before a Law Court. The notion that the Queen's Bench Division would under any circumstances issue a mandamus to the member for the Southern Division of St. Pancras commanding him to present a petition to the House of Commons, is on the face of it so absurd that one wonders it could seriously enter into the mind of any Englishman. But the ridiculousness of Mr. Chaffers' action does not end here. It rests on the belief, which is more prevalent than educated men suppose, that the member for a borough or county is under some special legal obligation to his constituency. This idea contradicts the whole theory of our constitution. For it is elementary knowledge that the member for St. Pancras is, when once elected, under the same obligations as any other M.P. He is a Member of Parliament. His duties whether legal or moral are duties owing to the nation, and not duties owed to St. Pancras or to the electors thereof.

A guaranty which is a guaranty and nothing more, is unenforceable if made by word of mouth; a guaranty which is something more than a guaranty, e.g. is part of an arrangement to share profits, is enforceable though made by word of mouth. This is the broad effect of *Couturier* v. *Hastie*, 8 Ex. 40, which is followed in *Sutton* v. *Grey*, '94, 1 Q. B. (C. A.) 285. Against the legal soundness of a distinction created by the subtlety of Parke B. we have nothing to object. But that it is a distinction grounded on common sense is a thesis we should be sorry to maintain. It is one of the endless niceties which are due to the feeling of our judges that the 4th and 17th sections of the Statute of Frauds have worked injustice. Is it

not time to consider whether the provisions of the Statute (a portion of which have been at once repealed and re-enacted by the Sale of Goods Act, 1893) and all the refinements to which these provisions have given rise should be done away with? Scotland prospers, and the 4th and 17th sections of the Statute of Frauds are unknown to Scotland.

Shaw v. *G. W. R. Co.*, '94, 1 Q. B. 373, is a singular example of a case of some general importance being decided on a ground not taken in the argument at all. The effect of the decision is that loss of goods carried by railway, when due to a wilful wrong of a servant of the Company, such as theft, outside the scope of his employment, is not within s. 7 of the Railway and Canal Traffic Act, and therefore the Company remains free to exempt itself by special contract within the saving of s. 6 of the Carriers Act of 1830, without regard to the contract being reasonable or not within the meaning of that term in the Railway and Canal Traffic Act. The Company may be said to be in luck: but we confess that we have little sympathy for parties who send valuables as common luggage undeclared and uninsured, and then expect to recover the full amount.

There is no doubt in fact that s. 2 of the Partnership Act, 1890, was not intended in any way to alter the law as settled by *Cox* v. *Hickman*, 8 H. L. C. 268, and explained in later cases, as to the extent to which receipt of a share of profits is evidence of partnership. North J., after carefully examining the language of this part of the Act, concluded that it gave effect to the decisions which were the ultimate authorities when the Act was passed, and that it might properly be illustrated by them: *Davis* v. *Davis*, '94, 1 Ch. 393.

Is the registered proprietor of a London cab responsible for acts of negligence committed by the driver who is not his servant, but has hired the cab? *King* v. *Spurr*, 8 Q. B. D. 104, answers this question in the negative. *King* v. *London Improved Cab Co.*, 23 Q. B. Div. 281, answers the question in the affirmative, and is followed by *Keen* v. *Henry*, '94, 1 Q. B. (C. A.) 292. This reply is satisfactory to every Londoner who is not a cab-owner, but, be it remarked, it can give no satisfaction to any one who is injured by a cab-driver's negligence out of London, for the cases we have referred to apply solely to cabs within the terms of the London Hackney Carriages Act, 1843, 6 & 7 Vict. c. 86, and imply, if they do not affirm, that except for the terms of that Act, the proprietor of a cab is not responsible for the negligence of a driver who has hired it. Why

the cab-owners of London should be under more stringent liabilities than the cab-owners of other cities, is a question which, like many other legal inquiries, can be answered only by the wisdom of Parliament.

A Divisional Court has held in *James* v. *Jones*, '94, 1 Q. B. 304, that baking powder is not an article of food. The nearest approach to a precedent with which we are acquainted is a decision (we believe not reported) of the Chief Court of the Panjáb that rifle cartridges capped but not filled with powder were not ammunition: a decision which the Government of India most properly instructed its executive officers to disregard. In *Bakewell* v. *Davis*, *ib.* 296, another Divisional Court upheld a conviction under the same statute, but with the curious reluctance so often shown by English judges to give effect to the plain meaning of the Legislature.

The *Revue du droit public et de la Science politique en France et à l'étranger*, edited by M. Ferdinand Larnaude, and published by MM. Chevalier-Marescq et Cie, claims to fill a palpable gap in the treatment of politics and public law. Both M. Larnaude's prefatory announcement and the contents of the first number give good promise.

Will the wonderful theological circular lately issued by the London School Board become a subject of judicial construction? It seems to throw us back to the days of 'Essays and Reviews.' But we fear there is no such luck in store for the profession.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE CASE OF *THE ZETA*.

THE House of Lords have arrived at the reasonable and right decision of *Mersey Docks & Harbour Board* v. *Turner, The Zeta*, '93. App. Ca. 468. Had it not been for the decision of the Court of Appeal in *Reg.* v. *Judge of the City of London Court*, '92, 1 Q. B. 273, neither that Court nor the House of Lords would have been troubled with *The Zeta*. As it is, the two cases stand together, and the earlier case is not overruled; but *The Zeta* shows at any rate that much that was said by the members of the Court of Appeal in the City of London Court case with reference to the history and jurisdiction of the Admiralty Court is not law. In both cases the view of the Court of Appeal was that the Admiral's jurisdiction in the case of damage to ships was limited to proceedings against the owner of the ship that does the damage, and therefore to cases of collision between two ships. It is not difficult to see how this idea has grown up. The rapid increase of collision and salvage cases in recent times, the absence of any reports of Admiralty Court Instance cases of earlier date than the present century, the decrepit condition of the Court during the preceding century, and the fear of prohibition which (not without cause) has possessed even such oracles of the Admiralty as Lord Stowell and Dr. Lushington, have given rise to the belief that the Admiral's jurisdiction no longer exists except in the narrow classes of cases of which instances are to be found in the books. There is nothing in the records of the Court to justify this doctrine. For a century before Lord Coke's time the records are voluminous and complete; and they show that of the multifarious matters litigated in the Court during that period collisions and salvage were amongst the rarest.

Putting aside the vast number of shipping and mercantile cases founded upon contract, we find that torts of various kinds were habitually tried and adjudicated upon in Admiralty. Thus in 1574 *The Anne* was lost by striking upon an unbuoyed wear set up in the sea by one Richmond of Harwich. Her owner Wolmer sued Richmond in Admiralty. This is the case which Fry L.J. in *The Zeta* suggested as possible, but which the Master of the Rolls scouted as impossible. The Lord Justice was right, both in his imaginary case and in his law. Cases of ships holing themselves by sitting upon unbuoyed anchors are common. Those of *The Susan* (1663) and of *The Mary* (1703), to which attention was called in

these pages, were relied upon by the Lord Chancellor in *The Zeta*; and they are but two amongst many others. They illustrate, however, the rapidly changing character of the business which must of necessity come before a Court that deals with maritime matters, the conditions of which are constantly changing. During the seventeenth and eighteenth centuries the danger of unbuoyed anchors was a real and a common one; in these days of ships that do not take the ground and of floating docks it seldom occurs. But the prominence of the subject in the records of the Court and in the mediaeval codes of maritime law show that it was at one time as common a cause of action as collision has become in these later days. Again, it was asked by the Court of Appeal in one of the recent cases, by way of a *reductio ad absurdum* of the argument that torts other than negligence causing collision were triable in Admiralty, whether slander was within the Admiral's jurisdiction. So far as the records show, it certainly was. In *Raynes* c. *Osborne* (1579) a sentence was passed for £50 damages for slander. The case next before it upon the file is a slander action in which £100 was recovered for damages. And there are many other slander suits; and so far as the present writer is aware, no one of them was stopped or attempted to be stopped by prohibition. There would be no difficulty in naming many other wrongful acts for which damages were recovered in Admiralty.

It seems not improbable that the Admiral's Court was originally instituted to deal effectually with cases of 'spoil'—in other words, piracy. The *causa spolii* is a very frequent, probably the most frequent, form of action in Admiralty throughout the sixteenth century. It was a civil action to get restitution of ships or goods piratically taken at sea *si extent, alioquin*, to recover damages. The practical extinction of piracy in the last century accounts for the non-exercise of the jurisdiction in such cases for many years; but in the face of the records of the Court it could scarcely be denied that the jurisdiction formerly existed and still exists. Yet, but for a casual reference to the matter by Lord Stowell in *The Hercules*, 2 Dods. 353, its existence would probably have been unknown. Although, as the Coram Rege Rolls show to have been the case, the jurisdiction of the Common Law Courts originally included torts committed at sea, from about the year 1364, these Courts appear to have abstained from exercising it and to have acquiesced in the exercise by the Admiral of his patent jurisdiction in such matters.

An examination of the prohibitions issued before the days of Lord Coke which are preserved amongst the records of the Admiralty—and there seems to be no reason to suppose that the few which are missing were in different terms—shows that they

all proceed upon the Statutes of Richard the Second, 13 Ric. 2, c. 5 and 15 Ric. 2, c. 3; and that the reason of every prohibition was an alleged exercise by the Admiral of his jurisdiction over a matter arising *infra corpus comitatus*. In the scramble for work and fees which raged throughout the sixteenth and first half of the seventeenth centuries, it seems to be not improbable that the common law practitioners made good use of the fiction of a false venue, and that they succeeded in obtaining prohibitions against their rivals of the civil law in some cases where the cause of action did in fact arise at sea; but the terms of the writs show that in no case was it the subject-matter of the action that caused the prohibition to issue, and that it was always the suggestion, which true or false could not be traversed, that the cause of action arose *infra corpus*.

During the period at which the *causa spolii* was so common a form of action, collision cases were very rare. Throughout the sixteenth century the number of sentences passed in collision cases may be counted on the fingers; whilst the number of spoil cases runs to hundreds, probably to thousands. So prevailing was the 'spoil' action that in some of the earlier cases of collision the language of the allegations in spoil suits is used in those of collision cases. *Spoliavit et fregit, impetum fecit in* and similar phrases indicate that the collision action is the lineal descendant of the *causa spolii*.

The question having now been raised afresh, there is every prospect of the House of Lords having to review the whole question of Admiralty jurisdiction, and to say by what authority it exercised the extensive jurisdiction in 'civil and maritime' cases, which it did in fact exercise for centuries before the days of Lord Coke. The ostensible authority of the Admiral during the sixteenth and seventeenth centuries was derived from the letters patent of his appointment. These are extant and purport to confer a jurisdiction over all tidal waters, altogether giving the go-by to the Statutes of Richard II. There can be no doubt that the omission in the patents of this period of any reference to these Statutes was intentional, for in the patents of the previous century the jurisdiction is limited by express reference to the Statutes of Richard. It is no less certain that the question of the validity of the patents of the sixteenth and seventeenth centuries must have been considered by the common law judges, and that they were held to be invalid so far as they were contrary to the Statutes of Richard. It is singular, however, that the point is not the subject of any reported case, and that although the prohibitions all recite and proceed upon

the Statutes of Richard II, there is no reference in any one of them to the terms of the patents. Similarly in Lord Coke's well-known *Articuli Admirallitatis* the contention of the civilians as to *non obstante statuto* is passed over in contemptuous silence. Oddly enough most of the collisions during the sixteenth and early part of the seventeenth centuries were in the Thames at or near London; yet in no case until *Hall* v. *Cook*[1] was the Admiralty Court prohibited, although the collision occurred within the body of the county. The prohibitions issued by Lord Coke, and subsequently to his time, are not amongst the Admiralty records; and it is not possible without a laborious search of the records of the Common Law Courts to say upon what grounds they issued.

With reference to the *City of London Court* case, where the question was as to the jurisdiction of the Admiral to entertain a suit against a pilot for negligence in damaging another ship, it may be mentioned that suits against pilots for loss of ships and cargoes through their negligence were formerly common. *Domries* v. *Lies* (1564) is one amongst several; but the case mentioned in the Court of Appeal, *Russell* v. *Hayes*, is not a pilot's case[2].

It is hoped that the Selden Society will before long issue a volume of extracts from the records of the High Court of Admiralty during the sixteenth century. The records begin about 1520, and show that until Lord Coke laid his hand upon the Admiralty Court, the amount of shipping and mercantile business transacted by it was very large. Insurance, bills of lading, average, bills of exchange, and charter parties were familiar to the Admiralty practitioners probably for many years before they formed any considerable part of the business of the Common Law Courts at Westminster. It is to the records of the Admiralty Court that historians of English commercial law must look for the earliest decisions upon such matters.

R. G. Marsden.

[1] This case (circa 1615) is probably that referred to in *Violet* v. *Blague*, Cro. Jac. 514.

[2] The writer takes this opportunity of pointing out that by a mistake for which he is responsible, the Court of Appeal (1892, P. 283) were misled into supposing that *Russell* v. *Hays*, Marsden's Ad. Ca. 307, was a suit against a pilot. John Hays was a *naupegus* (ship's carpenter). The record was produced to the Court of Appeal, but the misprint, *naugogus* for *naupegus*, escaped the notice of the Court as it had that of the editor of the report.

THE PRINCIPLE OF BETTERMENT IN ITS LEGAL ASPECT.

IN the following remarks I propose to consider the subject of 'Betterment' purely from a legal point of view, and to confine the term to the sense in which it has been much used and much canvassed in this country during the last few years. In America 'betterment' is applied to cases where the property of one man is improved by or at the expense of another man. But in England we use the term exclusively in a technical sense and in reference to cases where the property of certain individuals derives a special enhancement in value from an improvement made for the public benefit and at the public expense.

The first Report of the Royal Commission on the 'Housing of the Working Classes,' presented in 1885, defined *betterment* in relation to the subject-matter of the Report as 'the principle that rates should be levied in a higher measure upon the property which derives a distinct and direct advantage from an improvement, instead of upon the community generally, who have only the advantage of the general amelioration in the health of the district' (p. 47). This principle was recognized by our Legislature in one solitary instance more than two centuries ago. It was again to a small extent adopted in 1879 and 1882. But during the last four years it has become the subject of wide discussion in consequence of the proposal on the subject for which the London County Council sought the sanction of the Legislature in the Bill introduced by them into Parliament in the Session of 1890 to enable them to widen and improve the Strand. The controversy to which this proposal has given rise has hitherto prevented the Bill from becoming law; but the Council are bent on carrying out their policy if possible. It may therefore be useful to examine the question from the standpoint of pure law, and to inquire how far, if at all, the doctrine of 'betterment' is in accord with the principles of justice and equity. In so doing, we shall naturally be led into the discussion of the concrete law of our own and other countries upon the subject and upon other kindred topics. Concrete law is not always in harmony with abstract law, and where the two are out of accord, we should not hesitate to point out the fact. But the legal systems of civilized countries are for the most part in agreement with the recognized principles of justice

and equity; these principles being generally at the base of the systems, though, in some cases, positive laws have moulded, rather than followed, the received notions as to what is just and equitable.

In dealing with a comparatively novel subject, it is useful and sometimes even inevitable that we should proceed by analogy. As Sir Edward Coke says (Co. Litt. 191 a) *argumentum a simili* is good in law. The same may be said of *argumentum a contrario.* And in seeking to arrive at a right conclusion on the, comparatively speaking, new point which we are investigating, it will not be otherwise than pertinent to review the well-established law on the subject of what we may call 'worsement,' or the injuriously affecting of neighbouring property by the execution of public works, and also to consider the doctrines of law in reference to similar questions between private parties, and to note what are the legal rights or obligations of a man whose property is damaged or improved by the mode in which another individual deals with property of which this latter individual is *de facto* in peaceable possession. We shall then, I think, come to the conclusion that the principle of betterment is, in law, just and equitable, but that, like the counter principle of 'worsement' or the injuriously affecting of property, it ought to be applied only in clear cases and subject to strict regulations and conditions, if we would prevent it from becoming iniquitous and oppressive.

It will be convenient to remark, before proceeding further, that throughout this dissertation, I use the word 'property' as a short and convenient, though not, technically, very accurate expression, to denote real property of any kind, and any tenure, including hereditaments held merely for a term of years or any less chattel interest.

In all communities which have attained to any degree of civilization, the maxim *Sic utere tuo ut alienum non laedas* must necessarily be more or less recognized and acted upon. But in no legal system is it enforced in its full rigour. Take, for instance, our own law. *A* owns a piece of land adjoining *B*'s house and garden. If *B*'s house has stood there for twenty years, *A* cannot build on his land so as materially to diminish the light from any of *B*'s windows which have been in existence during the whole of that period. But short of this he has a perfect right to build so as to overlook *B*'s windows or his garden, and so substantially diminish the market value of the house as an agreeable residence; and, if *B*'s windows have been in existence a day short of twenty years, he may also build so as entirely to block them up; although his doing so will not inflict one penny less of injury on the house than would have been inflicted by blocking up windows which had been in existence for a score of years and upwards. *A* may also with

impunity diminish the value of *B*'s house by using his own land for any unsightly or otherwise unattractive purpose, which falls short of being an actual legal nuisance. The maxim, in fact, in its trite form, is hardly correct. It should rather run thus: *Sic utere tuo ut aliena jura non infringas.* What a man's *jura* with regard to his own property are, must, of course, in the absence of express or implied contract depend on the general law prevailing in the country wherein the property is situated. But whatever they may be, the infringement of the rights by dealings with the property itself on the part of a person temporarily in occupation of it, or by dealings with neighbouring property on the part of a person entitled to that neighbouring property, gives a right of action to the aggrieved individual, and a remedy in the shape either of pecuniary damages or of an injunction to restrain the injurious act, according to the circumstances of the case, and, sometimes, according to the option of the plaintiff.

The law as to 'worsement' or the injuriously affecting of property by neighbouring land being taken for public works, and these works being executed upon it, is founded upon the existence, as between neighbouring individual proprietors, of the rights to which allusion has been made. When in the interests of the community at large, and in accordance with the doctrine *Salus rei publicae suprema lex*, the compulsory taking of land, *nolente volente* the owner, is sanctioned by the Legislature for the purpose of some undertaking of public importance which cannot be carried out without this compulsion, it becomes necessary, on the one hand, to extinguish all rights of action which would otherwise have arisen in consequence of the carrying out of the undertaking in the manner contemplated by the Legislature, and, on the other hand, to provide an alternative remedy for the individuals who are deprived of these rights of action. The persons whose land is actually taken for the undertaking are the parties primarily aggrieved, and methods are always provided by which they may obtain not only the full price for the land actually taken, but also compensation for any damage which they may personally sustain by reason of other land of theirs being injuriously affected either through its severance from the bulk of the estate by the abstraction of the land taken for the undertaking, or in any other respect through the carrying out of the undertaking. But in the special Acts passed for public undertakings prior to 1845, and in the Lands Clauses Consolidation Act of that year (sect. 68), there is also to be found provision for compensation to persons who have none of their property actually taken for the purposes of the undertaking, but whose property is nevertheless injured

by the carrying out of the undertaking in the manner sanctioned by the Legislature. As this provision is the exact reverse of the principle of 'betterment,' it is important to examine closely the conditions under which the compensation is given. In the first place, it is confined to cases where the deterioration of the property is occasioned by some act or matter in connexion with the undertaking, which would have been actionable in the absence of statutory authorization, but which is within the powers given by the Legislature to the promoters of the undertaking, and for which, therefore, no right of action lies (*Glover* v. *North Staffordshire R. Co.*, 16 Q. B. 912). The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15) contains a clause (sec. 29) that nothing in that Act or in any special Gas Act shall prevent a Gas Company from being liable to an indictment for nuisance or to any other legal proceeding in consequence of making or supplying gas. Where, therefore, adjacent property is deteriorated by a nuisance arising from gas works, the remedy is to be sought in an action for damages, and compensation cannot be obtained under the 'worsement' provision of the Lands Clauses Act (*Broadbent* v. *Imperial Gas Co.*, 7 De. G. M. & G. 436; aff. 7 H. L. Ca. 600; 5 Jur. N. S. 1319). Nor can this compensation be obtained for injury done by an act of the promoters of the undertaking which is not within their statutory powers, or by a negligent and improper use of those powers. In such cases also the remedy is an action for damages (*Rex* v. *Hungerford Market Co.*, 1 A. & E. 668; *Laurence* v. *Great Northern R. Co.*, 16 Q. B. 643; *Biscoe* v. *Great Eastern R. Co.*, L. R. 16 Eq. 636; *Norton* v. *London and North Western R. Co.*, 9 Ch. D. 623). In the next place, the injury for which the compensation is given must be to the property itself, or have some reference to the property or its incidents. The language of the provision on the subject in the Railways Clauses Consolidation Acts, 1845 (8 & 9 Vict. c. 20, ss. 6, 16; c. 33, s. 6), with respect to railways in all parts of the United Kingdom is somewhat wider than the corresponding provisions of the Lands Clauses Consolidation Acts, 1845 (8 & 9 Vict. c. 18, s. 68; c. 19, s. 20), with respect to public undertakings generally. Where no land of the aggrieved party is actually taken, the Lands Clauses Acts only contemplate compensation being awarded to him in respect of the property of his which is injuriously affected by the works of the undertaking. The Railways Clauses Acts, on the other hand, direct that he shall receive, in like manner as if land of his had been actually taken, full compensation for all damage sustained by him, by reason of the exercise, as regards his property which has been injuriously affected, of the statutory powers given to the promoters of the undertaking. But in the case of *The*

Caledonian R. Co. v. *Walker's Trustees* (7 App. Ca. 259), decided in 1882, Lord Selborne laid down the following propositions as applicable to the wider provisions of the Railways Clauses Acts:—'(1) When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts; (2) When damage arises, not out of the execution but only out of the subsequent use of the work, then also there is no case for compensation; (3) Loss of trade, or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation; (4) The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.'

It should be observed that these axioms do not apply where property, besides being in part injuriously affected, is in part actually taken to be used for the works about to be executed. It has always been held that where some land of a person is actually taken by a public company or body for the purposes of their undertaking, that person is entitled to compensation for items of pecuniary loss sustained by him in connexion either with the land taken or with any adjacent land of his, for which he would not have been entitled in connexion with adjoining land of his, if no land of his had been actually taken for the undertaking. (*Re Stockport, Timperley & Altrincham R. Co.*, 10 Jur. N. S. 614; 33 L. J. Q. B. 251; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, at pp. 446, 458; *Cowper Essex* v. *Local Board for Acton*, 14 App. Ca. 153.) Some diversity is also inevitably introduced into the application of the axioms by the fact already noticed of the language of the English and Irish and Scotch Railways Clauses Acts, 1845 (which of course only relate to railways), as regards the damage for which compensation is obtainable, being much wider than that of the two Lands Clauses Acts, 1845, for the United Kingdom, which relate to all public undertakings. An instance of this diversity is afforded by the case of *Re London, Tilbury & Southend Railway Company and Trustees of Gowers Walk Schools* (24 Q. B. D. 40; aff. 326). The railway company had interfered with the access of light to windows, some of which were ancient lights and some not; and it was held that under the Railways Clauses Act, 1845, they were bound to pay compensation for their interference not only with the old lights but also with the new; although, of course, no action could have been brought

against them for blocking the latter. I conceive, however, that this decision might have been upheld even under the stricter language of the Lands Clauses Act, 1845, on the ground that the Company in interfering with ancient lights were actually abstracting an easement, or, in other words, taking possession of a hereditament, and that the owners, therefore, fell within the category of persons whose property was not merely injuriously affected, but was actually in part taken.

In the present inquiry, however, we are only concerned with the cases where property of a person is injuriously affected by an undertaking, for which none of his property is actually taken. In such cases the provisions of the Railways Clauses Acts, as distinguished from those of the Lands Clauses Acts, have been held to entitle the owner of property which is structurally damaged and depreciated in value by the construction of a railway, to compensation also for damage occasioned by that construction to goods lying upon the property (*Knock* v. *Metropolitan Railway Co.*, L. R. 4 C. P. 131); although if the property had not been itself injuriously affected, no compensation could have been obtained in respect of the goods. But in a case decided nearly sixty years ago the London Docks Company, under their Acts which contained compensation clauses, were held not liable to compensate the tenant of a public-house, for loss sustained by him through the pulling down of neighbouring houses and obstruction of access to the public-house in connexion with an improvement in the docks, which had occasioned a diminution of his customers and had lessened the selling and letting value of his premises as a public-house though not as a private residence (*Rex* v. *London Dock Co.*, 5 Ad. & Ell. 163). And the same principle has been sustained by later decisions (*Cameron* v. *Charing Cross Railway Co.*, 19 C. B. N. S. 764; *Rickett* v. *Metropolitan Railway Co.*, L. R. 2 H. L. 175). On the other hand, where the construction of a railway embankment on a portion of the highway opposite a house had the effect of narrowing the road from fifty to thirty-three feet and thereby obstructed the access of light and air to it and materially diminished its selling and letting value, the owner was held entitled to compensation from the railway company (*Beckett* v. *Midland Railway Co.*, L. R. 3 C. P. 82). The broad fact, however, remains that there is a numerous class of persons injured by the construction of a railway for whom the Legislature has not provided compensation (*Bailey* v. *De Crespigny*, 10 Best & Sm. 1, at p. 16 [1]), and it may be added that the class is still more numerous

[1] The most recent illustration of this is furnished by the case of *Att.-Gen. & Hare* v. *Metropolitan Railway Co.* (L. R. [1894] 1 Q.B. 384), in which the Court of Appeal delivered judgment on Dec. 4, 1893, reversing the decision of Wright J. in the Court below.

in the case of other public works, in respect of which compensation is regulated by the Lands Clauses Act alone and not by the Railways Clauses Act. In this branch of the law, as well as in others, there is no such principle as *ubi damnum ibi remedium*. It is only true that *ubi jus* or *ubi injuria, ibi remedium*; and there are plenty of cases of *damnum sine injuriâ*.

Let us now turn to the other side of the question, and consider the legal rights and obligations which arise in cases where a man's property is improved or bettered by the act of another individual, or by the execution of public works. It will be convenient to treat this second branch of the subject in the same order as was adopted in reference to the deterioration of property, and to consider it first as between two private individuals. The principle of paying damages or compensation for the depreciation of property rests, as we saw, upon the legal maxim *Sic utere tuo ut alienum non laedas*. The principle of receiving remuneration or compensation for the amelioration of property rests upon two other maxims, *Qui sentit commodum sentire debet et onus* and *nemo debet locupletari alienâ jacturâ*. The former maxim, as we have observed, is of by no means universal application; and, in the same way, the latter pair are, in our law, much limited in their operation. But there is probably no legal system in which their range is so restricted as our own. Under the Roman law a person who in good faith entered into possession or occupation of property which in fact belonged to another, and executed improvements upon it without that other's knowledge or consent, was entitled, upon being afterwards ejected by the true owner, to be reimbursed the costs of the improvements, so far as the property was, in consequence of their having been made, augmented in value at the time when the true owner recovered possession (Dig. lib. vi. tit. 1, § 48; Inst. lib. ii. tit. 1, §§ 30, 32). But having regard to the possibility that the true owner might be unable to pay the amount of the costs, or might prefer that the property should have remained in its unimproved state, the judge was empowered to modify the rule according to circumstances, and the ejected occupier was permitted, at his option, to remove from the property the materials of the improvement instead of receiving compensation (Dig. lib. vi. tit. 1, § 38). The same principles have been affirmed in modern times by the great French jurist Pothier, who points out the distinction between an outlay made by a *de facto* possessor upon the property of another, according as it is made either (1) for the discharge of the property from an incumbrance, or (2) for its preservation, or (3) simply for its amelioration. He lays down that if the possession was *mala fide*, the possessor has only a right to reimbursement in the first

two cases; but if his possession was *bona fide*, he has also a right to recoupment in respect of the expenses incurred by him in ameliorating the property. Pothier, however, adds that this right is subject to certain limitations. The *bona fide* possessor has no right to be reimbursed precisely and absolutely the amount which he has laid out, but only the amount by which the value of the thing is, at the time of its recovery by the true owner, augmented in consequence of the outlay; and this last limitation is further subject to qualifications according to circumstances (*Traité du Droit de Domaine de Propriété*, II^e^ Partie, chap. I. De l'Action de Revendication, Art. 6. §§ 343–349).

This principle of compensation for improvements was recognized in the *Code Napoleon* in the case of recovery by the true owner from a person in possession (Liv. II. Tit. ii. § 555) and also (Liv. III. Tit. vi. §§ 1632–1634) in case of a sale of property to a purchaser who then improved it and was subsequently evicted by a title paramount to that of the vendor; and likewise in the case of an heir who on coming into a succession had to restore to his coheirs property which he had received from the ancestor by donation during life and which he had improved after it had been given to him. In such a case he was to be entitled to reimbursement of the costs of the improvement, regard being had to the augmented value of the property at the time of its surrender to the coheirs, and he was permitted to retain possession of the property until he was so reimbursed (Liv. III. Tit. i. §§ 845, 861, 867). But it was laid down, on the other hand, that a usufructuary cannot at the conclusion of his usufruct claim any indemnity for improvements which he may pretend to have made, although the value of the property may have been augmented thereby (Liv. II. Tit. iii. § 599). The principle under consideration has also been introduced very generally into the United States of America by statutes known there as Betterment Laws. But it has only been very sparingly recognized in our own legal system. It has been adopted by our statute law in the case of agricultural improvements, for which the recent legislation of 1875 and 1883 (38 & 39 Vict. c. 92; 46 & 47 Vict. c. 61) has enabled a tenant on giving up his holding to obtain compensation from the landlord, and in the case of permanent improvements executed by a tenant for life, the cost of which he is in certain cases entitled to throw upon the inheritance or *corpus* of the property. And, independently of statute law, it has been decided by our courts of equity that a mortgagee who has entered into possession of the mortgaged property and has expended money in the permanent improvement of the property with notice to and tacit acquiescence on the part of

the mortgagor, is entitled, as against the mortgagor seeking to redeem the mortgage, to a reimbursement in respect of that expenditure, so far as it has actually increased the selling value of the property. But the improvements must be of a reasonable nature, and must not be of such an extent as to make it impossible for the mortgagor, with his means, to redeem the property, for that would be to improve him out of his estate. And if the mortgagee has actually sold the property at an enhanced price owing to improvements which he has made in it, the question whether the mortgagor had or had not notice of the improvements is immaterial. In either case the mortgagee is entitled to reimburse himself in respect of the improvements out of the purchase-money which has been augmented in amount thereby (*Saudon* v. *Hooper*, 6 Beav. 246; *Shepard* v. *Jones*, 21 Ch. D. 469). It has also been held in equity that if one of several joint purchasers lays out money in the repair or improvement of the property and dies, this shall be a lien on the property in favour of the representatives of the deceased (*Lake* v. *Gibson*, 1 Eq. Ca. Ab. 294; 1 Wh. & Tud. L. Ca. 6th ed. 215). Our law also recognizes to a limited extent the principle of the maxim *Qui sentit commodum sentire debet et onus*, by requiring that where a person has the opportunity or option of taking or receiving a property or a benefit which is subject to or coupled with a burden or obligation, he cannot take the property or benefit without rendering himself liable to the burden or obligation. Thus a purchaser of a leasehold interest becomes, by privity of estate, liable to the lessor for the performance and observance of the lessee's covenants and conditions contained in the lease. And where by a will beneficial and onerous legacies are given together as one entire gift, or there is an evident intention on the part of the testator that the legatee shall not take one without the other, he must take all or none (*Talbot* v. *Lord Radnor*, 3 My. & K. 252; *Guthrie* v. *Walrond*, 22 Ch. D. 573).

It will be noticed that in all the cases which have been mentioned of compensation for the amelioration of one man's property by another individual, the amelioration is invariably due to something done upon the property ameliorated. In no civilized country does the law recognize that a person who for his own purposes executes works upon his own property, and thereby incidentally improves his neighbour's adjacent property, has any claim against the neighbour for compensation in respect of such improvement, or for recoupment of any part of the expenses by means of which it has been effected. In all cases of the application of the maxim *Qui sentit commodum sentire debet et onus*, the *commodum* has been voluntarily assumed with a knowledge at the time that the *onus* existed, and that it would have to be assumed also.

But the recent proposals with regard to betterment contemplate that a public body who in executing their own works for their own purposes incidentally improve adjacent property, shall have the right to impose part of the expense of the works on the owner of that property without leaving him an option in the matter; so that a person who receives a *commodum* not only without his consent, but also without the possibility of declining it, shall be bound to assume a corresponding *onus* with it. If these proposals are sound in law, their soundness certainly cannot be supported by any recognized law of betterment or amelioration as between private individuals. They are to be justified, if at all, either on their own legal merits, whether with or without previous legal precedent, or on the analogy of the counter-principle which we have already considered of compensation for the 'worsement' of property by public works.

No precedent to guide us in the matter is to be found in Roman law. But the justice and equity of the principle have been affirmed by many statutes of various State Legislatures in the United States of America, and by numerous decisions in cases which have come before the American Courts. To cite only one of these cases, the legal aspect of the principle was fully considered in the Supreme Court of Massachusetts in the year 1866 under the exceptional opportunities for the discussion of abstract questions of law which exist in the United States, where, under the Constitution, the Supreme Court of each State has power to pronounce an Act of the Legislature of that State unconstitutional and illegal, and the Supreme Court of the United States can in like manner declare an Act of Congress to be a violation of the Constitution and therefore void. The case of *Dorgan* v. *City of Boston* (12 Allen's Rep. Supr. Court of Mass. 223) arose upon a Statute of the Massachusetts Legislature (St. 1865, c. 159), which authorized the Corporation of the City of Boston to widen a certain street in the city. The Corporation were to pay to the owners of land taken for the purposes of the improvement compensation according to the value of the land before the improvement was effected, and the whole expense of the improvement, including the compensation so to be paid for the land taken, was to be assessed upon all the estates abutting on the widened street in proportion to their value after the improvement had been made. But it was also provided by section 10 of the Statute that any owner of an abutting estate might elect to surrender the whole of his estate to the city, and in that case the city were to purchase it from him and were to be at liberty to resell the portion not actually required for the execution of the improvement. The plaintiff, Edward Dorgan,

who was an owner of abutting property, filed a bill in equity to restrain the City of Boston from exercising the powers of their Statute in reference to his property. He alleged that the portion of his estate which would be left to him after the street had been widened would be almost valueless, but that the defendant Corporation were nevertheless proceeding to assess a large sum upon him in respect of it, and that the Statute under which they claimed to do so was unconstitutional and void. In the present disquisition we are not concerned with the objections which he advanced to the validity of the Statute on the ground of the mode in which it provided for the determination and payment of compensation for property actually taken by the City. But he further objected that the assessment provided by the Statute as the means by which the expenses of the improvement were to be defrayed was a violation of the State Constitution. It was admitted that similar betterment laws had been passed and sustained as valid in the Courts of law in other States; but it was urged that their validity had been upheld on the express ground that there was nothing in the constitutions of those States which restricted the power of their legislatures over taxation. The Constitution of Massachusetts, on the other hand, had expressly empowered the State Legislature to impose only proportional and reasonable taxes. The Court, however, in its judgment on the case held that this provision of the Constitution referred only to taxation for defraying the public and general charges of government. Where money was expended in effecting an improvement of a local character, which, although it might enure, to a certain extent, to the benefit of the public, was nevertheless especially necessary for, and beneficial to, private property in its immediate vicinity, it would not be equitable or just, nor would it tend to the equalization of public burdens, that the cost of the improvement should be laid on the whole people. The Court saw no reason for construing the provision as an inhibition on the levy of a tax for local purposes of a public nature upon those who would reap the benefit on their estates of the proposed expenditure of money. The judgment of the Court proceeds to cite several instances, dating from 1658 onwards, in which a like mode of assessment of taxes for similar objects had been resorted to and carried into effect, without doubt or question, in the commonwealth of Massachusetts, both under the colonial government and since the adoption of the constitution. It was apparent that the Statute objected to by the plaintiff could not be regarded as an innovation. On the contrary, it seemed to be entirely in accordance with the established course of legislation from the foundation of the government. But there was further to

be taken into consideration the provision in section 10 of the Statute, requiring the City to purchase the whole of the estate of an abutting owner, who should elect to surrender it to them in its entirety rather than retain a portion saddled with the improvement tax. Construing that section with the previous provisions of the Statute, the Court thought that the State Legislature had in substance required the City to take the whole estates abutting on the proposed improvement, in case it should be necessary for the completion of the work and the more easy adjustment of the damages. In the event of all the owners of the abutting estates electing to surrender them, the entire cost of the work would fall upon the City; and if, after the construction of the new street, those portions of the estates which were not absorbed in the street, produced, when sold, less than the whole cost of the work, the deficiency when sold would be a public charge, to be defrayed by general taxation. It was clear, therefore, that the Legislature considered the work to be of such a public nature and such general convenience as to warrant them in authorizing, in a certain contingency, the taking of the whole of the abutting estates for the purpose of carrying it out. In the language of the judgment, the effect of the Statute was to condemn all these estates 'as being subject to sequestration under the right of eminent domain for a public use.' But inasmuch as it might not be actually necessary that the whole of every estate should be taken, the owners were allowed the privilege of retaining the portions not required on condition that those portions should be subject to assessment for the cost of the work, rateably in proportion to their respective values after the completion of the improvement. The right given to an abutting owner by section 10 of the Statute was in effect nothing more than a mode of signifying that he did not wish to exercise the privilege of reclaiming any part of his estate after the completion of the work on the terms prescribed by the Statute, but that the whole might be appropriated to the use of the city, and disposed of by the city accordingly. In that view, the assessment in question could not be regarded as imposed on the plaintiff against his will, but must be deemed one which he had voluntarily assumed in order to save a portion of his estate from being appropriated under the right of eminent domain to a public use. That being so, the Court held that he stood in such relations to the defendant City as to render the maxim *Volenti non fit injuria* an answer to the bill, and that the bill must accordingly be dismissed as showing no claim to equitable relief.

The instances of the application of the principle which have occurred in our country up to the present time have not travelled

beyond the limits of justice and equity laid down in the Massachusetts judgment, which has just been quoted. As mentioned at the outset, the first incorporation of the principle into our statute law took place as early as 1666. In that year the Act 18 & 19 Charles II. c. 8, for the rebuilding of London after the great fire, empowered the Corporation of the City to enlarge certain streets, and then enacted that the owners of houses which were rebuilt on sites adjoining the enlargements, in consideration of the consequent improvement and melioration of their property, should pay such sum to the Corporation as should be mutually agreed upon or as in default of agreement should be awarded by a jury.

This, however, was an exceptional enactment occasioned by a wholly exceptional catastrophe. Coming down to more recent times we can trace in the legislation of the present reign the gradual adoption of the principle and its development into the position which it now holds. We find an instance of it, in its earliest stage, in the Public Health Act of 1875 (38 & 39 Vict. c. 55, ss. 23, 36, 41, 213, 215, 232). Under that statute sanitary authorities are empowered to require the owners or occupiers of houses within their district, which are not sufficiently provided with drains and sanitary accommodation, to supply the deficiency at their own cost. If they fail to do this, the sanitary authority may themselves execute the necessary works and may declare the costs incurred by them in so doing to be 'private improvement expenses.' It is then enacted that whenever these private improvement expenses are incurred, the authority may, if they think fit, impose a private improvement rate on the property in respect of which they have been incurred, of such an amount as will discharge the amount of the expenses with interest at a limited rate in a period of not exceeding thirty years, with power for any owner or occupier of the property to redeem the rate on payment of a corresponding capital sum. In these provisions it will be observed that the application of the principle of betterment is confined to charging with the exact expense of amelioration the premises actually ameliorated by an outlay made upon them. Four years later, however, the principle was carried a step further so as to embrace property increased in value by works executed upon other property of the same owner. For by the Artisans Dwelling Act of 1879 any owner of unfit dwellings who had been required by a local authority to alter or demolish them, might make a counter requisition on the local authority to purchase the premises from him. In that case the amount of the purchase-money was, in default of agreement, to be settled by arbitration, and it was provided that the arbitrator in assessing the amount should have regard to and make an allowance

in respect of any increased value accruing in his opinion to other property of the same owner from the alteration or demolition of the purchased premises which the local authority intended to carry out (42 & 43 Vict. c. 64. ss. 5–7). After an interval of three years the principle was again extended, and was, by the Artisans Dwellings Amendment Act of 1882, applied to cases where the ameliorated property and the property dealt with by the public body belonged to different owners. That statute authorized local authorities to order the demolition of buildings which obstructed other premises by stopping ventilation or otherwise, and then proceeded to enact that where, in the opinion of the appointed arbitrator, the demolition of an obstructive building added to the value of the previously obstructed premises, he should apportion among those premises so much of the compensation to be paid for the demolition of the obstructive building as should be equal to their increase in value. The amount so apportioned to each of the premises was to be deemed private improvement expenses incurred by the local authority in respect of the premises, within the meaning of the Public Health Act, 1875; and the local authority might levy improvement rates within the meaning of that Act on the occupiers of the ameliorated premises for the purpose of defraying those expenses. Disputes between any such occupier and the arbitrator as to the amount to be so apportioned were to be settled by two justices in the manner provided by the Lands Clauses Act, 1845 (45 & 46 Vict. c. 54. s. 8). The above-mentioned provisions of the Acts of 1879 and 1882 were repealed and re-enacted by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70. ss. 38 (8), 41 (2) (b)).

All these applications of the principle of betterment are unquestionably just and equitable, and it will be noticed that they are all covered by the analogy of the converse case of the injuriously affecting of property as provided for by the Lands Clauses Act. The same cannot be said of the further extension of the principle attempted but not as yet effected by the London County Council in connexion with their scheme for widening and improving the Strand. Their Bill on the subject was introduced into Parliament in the Session of 1890. The 28th clause of this Bill, which became popularly known as the 'betterment clause,' began by reciting that the improvement would be effected at the expense of the London ratepayers, but would or might increase in value lands and property fronting on or in the neighbourhood of the improvement, and it was reasonable that such increased value should be reserved wholly or in part for the ratepayers by whose expenditure it had been produced. The clause then proposed that a Standing Arbitrator should be appointed by the Home Secretary on the application of the London County

Council, and that a rentcharge to be called the Strand Improvement Rentcharge should be created of such a total amount as when capitalized would not, in the opinion of the arbitrator, exceed one-half of the cost of the improvement. Within three years after the completion of the improvement the County Council were to frame a provisional award describing the premises which in their opinion would be increased in value by or in consequence of the improvement, and stating the amount of increased value resulting in their opinion to the several premises, the proportion of the Strand Improvement Rentcharge which would be apportioned on the respective premises, and the owners lessees and occupiers by whom the rentcharge would be payable. The premises to be assessed were all to be included within the area defined by the Bill—an area of tolerably wide limits around the site of the improvement. Power was proposed to be given to any owner or lessee or occupier of premises affected by the provisional award to object to the award on the ground that the premises ought to be excluded from it, or that premises omitted from the award ought to be inserted in it, or that the award was incorrect in some point of fact or in the amount of increased value attributed to the premises, or that the increased value was not due to the improvement, or that the rentcharge in respect of the premises ought to be paid by some other person or persons than the award prescribed. The validity of the objection was then to be determined by the Standing Arbitrator. The clause contained other ancillary provisions, but those which have been cited above indicate the principles and method proposed to be adopted in giving effect to the principle of betterment in reference to the intended widening of the Strand. The Bill, as already mentioned, has not yet become law, and the above-cited provisions of its 28th clause assuredly ought never to be placed upon our statute book. There is, of course, no objection to recognizing the fact that as property may be injuriously affected by a diminution of the facilities for access to it, so it may be improved by an increase of those facilities through the widening of an adjacent thoroughfare. There is no objection to imposing upon the owners of property so improved a rate representing the increment in value which has actually accrued; though there is much to be said in favour of the equity of allowing to the owners in such cases the option of requiring the public authority to purchase the property from them at its unincremented value. But the unjust and inequitable feature of the proposal of the London County Council was the assumption that within an arbitrarily defined area in proximity to, though not actually abutting on, the site of the improvement, property would be thereby increased in value to an aggregate

amount equivalent to one moiety of the total cost of the improvement, so that an aggregate improvement rate, which, if capitalized, would represent that moiety, might fairly be imposed upon the lands and buildings or some of the lands and buildings within the specified area. For observe the particular form of the proposal. The increase in the value of a particular property within the area in question was not to be taken as a measure of the actual amount of rate which the property was to bear. That would have been equitable enough. But it was only to be taken as a measure of the proportionate part which the property was to bear, relatively to other properties, of an aggregate rate of an arbitrary and unchallengeable amount. The persons interested in any property proposed to be charged with this improvement rate were to be permitted to call in question the proportionate amount to which their particular property was to be liable in respect of the whole rate, either on the ground that the property ought not to be subjected to the rate at all, or on the ground that its proportion of the rate ought to be diminished by the liability to the rate being extended to some other properties not proposed to be rated, or by a reduction of the amount at which the property was set down as having been increased in value by the improvement. The liberty to show that other properties, though included in liability to the rate, were insufficiently rated, having regard to the actual extent to which they were improved, would appear to have been omitted from some oversight, since it is on all fours with the grounds of objection actually conceded to the persons who were destined to bear the rate. But they were designedly not to be permitted to call in question the total amount of the aggregate improvement rate. • The idea of the London County Council was in fact the same as if Parliament, when it authorized the construction of a railway, instead of allowing each owner of adjacent properties which were injuriously affected by the construction to prove the extent of the damage sustained by his property and to recover that amount from the railway company, were to fix in the first instance the aggregate amount to be paid by the company to the owners of all adjacent properties injuriously affected, and were only to leave it to the several owners to prove as between themselves the relative extent to which their respective properties were injured, with a view to settling what proportionate amount of the available fund each owner was entitled to receive. The injustice of such an arrangement is apparent on the face of it; independently of the endless cost and trouble which it would entail upon each owner in proving that the amount of injury inflicted on other properties was over-estimated, as well as that the effect on his own was insufficiently estimated.

No less intrinsically unjust is the scheme of the London County Council, and no less oppressive would be the labour and expense which it would impose on the landowners concerned, in showing not only that the estimate of the improvement of their own property was exaggerated, but also that the improvement of other properties was under-estimated. It is also to be observed that a single arbitrator, appointed *ad hoc* by a strong political partisan, as the Home Secretary might not improbably be, at the request of the London County Council, would be a very unsatisfactory tribunal for assessing the amount of the rate to be borne by the persons upon whom it was sought to be imposed.

Our review of the whole subject has, I think, established the conclusion which I suggested at the outset of the inquiry—namely, that betterment, or the liability of property improved by public works to contribute in respect of that improvement to the cost of the works, is a sound legal principle, but that the extent and manner of its recognition and application ought to be very strictly defined. In accordance with this conclusion we shall approve as just and equitable the enactments of 1666, 1875, 1879 and 1882, to which reference has been made. We shall also approve the introduction of the principle into the Strand Improvement Scheme of the London County Council. If property is injuriously affected by diminishing the modes of access to it, there can be no question that it is ameliorated by an improvement in those modes of access. But we shall not approve the method in which the London County Council have proposed to carry out the principle. We shall insist that in its application the following conditions should be recognized and observed :—

1. Just as compensation cannot be obtained by aggrieved parties in all cases of damage caused by the execution of public works, so a betterment tax cannot be imposed on all parties who happen to derive some special benefit from the works. The principle ought only to be applied where property is by the operation clearly increased in value intrinsically, and not merely in reference to any particular use to which it may from time to time be put.

2. Just as, in the case of worsement or the injuriously affecting of property, the owner is allowed by the Lands Clauses Act, 1845 to select whether the tribunal to determine the compensation shall be arbitrators or a jury ; so, and much more, in reference to betterment, the party who is to be taxed ought to be permitted to select the tribunal by whom the tax upon him shall be assessed. A recognition of the right of the party who is to be taxed to be satisfied as to the competency and impartiality of the tribunal is essential to the equitable working out of the principle.

3. If the owners of the ameliorated properties are offered no alternative but to submit to the betterment tax, each case ought to be investigated and decided on its own merits; and the tax on each property ought not to be of a greater amount than, when capitalized, will represent the actual increase in value of the property caused by the execution of the works.

4. The assessment of any betterment tax on properties actually or conjecturally improved by the execution of public works otherwise than in accordance with the three conditions just laid down can only be justified, if, as an alternative to bearing the tax, the owners are given the option of requiring the body which is executing the works to purchase the properties at the values at which they stood previously to the commencement of the works. It would be more strictly just and equitable that this option should be given in all cases, even where the tax proposed to be levied strictly represents the actual amount by which the property is increased in value.

5. The betterment tax, whether it is imposed in the form of a perpetual or of a terminable rentcharge, ought to be capable of being redeemed by any person interested in the property, either before it is begun to be levied, or at any time afterwards during its continuance.

PHILIP VERNON SMITH.

BREACH OF PROMISE OF MARRIAGE.

IN the following pages it is not my intention to expatiate on the details of a department of law so fully settled as this, but rather to trace how this action originated both in England and Scotland, to indicate the position in which it stands at present, and to suggest on what broad principles practical reforms may be made.

In the very remarkable extension of actions on the case, and especially of assumpsit, by which so much was brought within the cognizance of the common law, it was held as early as the reign of Charles the First that 'if *A* in consideration that *B* promised him to take him to be her husband, promises to take *B* to be his wife *infra breve tempus* after, and after *A* marries another woman, *B* may have an action upon the case against *A* upon this promise, for this is a good consideration[1].' Considerable objection, however, was taken on the ground that the consideration was a purely spiritual one and that the matter was not cognizable by common law, and a writ of error was brought, but the judgment was confirmed by the Court of King's Bench. In 1651 a similar decision was given in *Baker* v. *Smith*[2], and nineteen years later the same principle was acted upon in *Mills* v. *Middleton*[3], but the most exhaustive discussion seems to have taken place in 1672 when the case of *Mary Holcroft* v. *Dickenson*[4] came before the Court of Common Pleas. The allegation of the plaintiff was that the defendant by the breach of his promise had 'hindered her preferment to her damage of 100 pounds.' Each of the three judges who formed the court considered the relative jurisdictions of the courts of common law and the ecclesiastical courts at great length, and finally (Chief Justice Vaughan dissenting) decided that this action was maintainable at common law.

In 1698 the action passed into a further stage of development in *Harrison* v. *Cage et uxor*[5], in which a man brought a similar action against a lady who had pledged her vows to him and afterwards gone and married another, that fortunate man being joined as defendant for reasons sufficiently obvious before the days of Married Women's Property Acts. It does not appear that any technical objection was taken at the trial, and a prosaic but

[1] *Stretch* v. *Parker*, Mich. 12 Car. Rot. 21; Ro. Abr. 22.
[2] Style 295. [3] Keble 866. [4] Cart. 233.
[5] Carthew 467; 5 Mod. 411; 1 Salk. 24.

sympathetic jury found 'a verdict for the plaintiff and £400 damages, the woman being worth £3000 when the plaintiff courted her, and after the death of her brother worth double that sum' (!) and Chief Baron Ward gave judgment accordingly. After an unsuccessful application for a new trial on the ground of excessive damages, a motion was brought in the King's Bench in arrest of judgment, on the ground that no action lay. In support of the motion it was argued that 'it is not reasonable that a young woman should be caught into a promise' and voidability from uncertainty as to time was suggested, but the points most relied upon appear to have been that there was no case in which the writ *causa matrimoniae praelocuti* had been held good against a woman, and that, as in the eye of the law a man was not advanced by marriage, the woman's promise was of no value in law, and thus the contract must fail for lack of consideration. But the judges held otherwise. Rokeby J. pointed out that a man had an action for slander *per quod matrimonium amisit*, which was hardly consistent with the defendant's ungallant contention as to woman's worth; and Holt C.J. and Turton J. took the simple ground that the promises were mutual, so that if an action lay on the one promise it would lie on the other also. The reasoning of the Chief Justice, however, is not quite so clear when he goes on to say, 'In the ecclesiastical court he [the plaintiff] might have compelled a performance of this promise; but here indeed she has disabled herself, for she has married another,' for the canon law decreed such specific performance only where the words had amounted to *matrimonium per verbis de praesenti*, which, by the canon law, of itself constituted a marriage, all that was enforced being the additional formality of solemnization in face of the Church. In such case, even if in the meantime one of the parties had actually solemnized a marriage with some one else, the ecclesiastical courts (at the time of their full power) would have treated the latter as void and would have enforced the formalities of the original contract[1]. If, however, that original contract had not amounted to *matrimonium per verbis de praesenti* they would not have proceeded beyond an admonition. Perhaps by this time the activity of the ecclesiastical courts had diminished. Perhaps, even apart from any decree of specific performance, the fact that such a substantial thing as an ecclesiastical admonition then was lay behind it, might be sufficient, even at common law, to redeem the promise from the forlorn condition of a *nudum pactum*.

In 1704[2] Chief Justice Holt further ruled that this action would

[1] As in *Bunting* v. *Lepingwell*, 4 Co. 355. Phillimore's Ecclesiastical Law, *passim*.
[2] *Hutton* v. *Mansell*, 6 Mod. 172.

lie even without the proof of an express reciprocal promise by the plaintiff—in this case a lady—so long as it could fairly be implied from the circumstances. Fifteen years later, in *Holt* v. *Ward Clarencieux*[1] an action was brought by an infant and a verdict was given for £2000 damages. The plea of infancy was raised on demurrer in the Court of King's Bench, and in support of it the rules of the canon law on this point were clearly set out. Lord Chief Justice Raymond, however, who pronounced the judgment of the Court, held that as this action was maintainable at common law, it must be measured by common law rules, and that, consequently, such a contract was voidable by the infant, but binding on the person of full age. The rules of the canon law, so far as they bore on this matter, had now at last been quietly laid at rest, and have never since been disturbed. The action was dependent on the rules of the common law alone, and in 1729 in *Cork* v. *Baker*[2] the important decision was arrived at that the words of the fourth section of the Statute of Frauds, which required signed writing to maintain an action on 'any agreement made upon consideration of marriage,' did not apply to this class of bargains. Had it been otherwise, how different would the course of litigation have proved.

The more modern series of cases seem to begin with *Atchinson* v. *Baker*[3], in which a gentlemen, who, owing to the deterioration of his health, had lost the affections of the lady who was pledged to him, by the same cause suffered the additional disappointment of defeat in the action which he subsequently brought. *Foulkes* v. *Sellway*[4] in 1800 and *Potter* v. *Deboos*[5] in 1815 were early modern cases with fair plaintiffs, and as time went on their actions grew more numerous and their victories more magnificent, though it must be admitted that they never in this country reached that phenomenal state which they apparently attained in the United States[6]. The excessive laxity which characterized them at length received somewhat of a check by the Evidence Amendment Act of 1869, which required that the plaintiff's evidence should be corroborated. *Bessela* v. *Stern*[7] showed how slight a corroboration would be sufficient for the purpose—the evidence of an eavesdropper, who had heard (!) the defendant remain silent when charged by the plaintiff with the promise, fulfilling the requirements—but *Wiedemann* v. *Walpole*[8] showed that the provisions were by no means illusory.

[1] 2 Str. 937. [2] 1 Str. 34. [3] Peake Add. Ca. 103 [1796].
[4] 3 Esp. 235. [5] 1 Stark 82.
[6] American cases cited by Willes J. in *Smith* v. *Woodfine*, 1 C. B. N. S. 660 *passim*.
[7] L. R. 2 C. P. D. 265. [8] '91, 2 Q. B. 534.

In Scotland the modern style of action appeared a few years earlier than the decision of *Harrison* v. *Cage et uxor.* Marriage was (as it still is) based upon the system of *matrimonium per verbis de praesenti* without any further solemnity being required, and might be of the most informal character—'irregular marriages' being then the rule rather than the exception. Yet Scots law, following the doctrine of the old civil law, laid down that until the marriage (however informal) actually took place, there was always a *locus poenitentiae*—a right freely to change one's mind—subject only to this, that the party who 'resiled' without fault on the other side, should make good to that other party any expense, such as special attire, which had been incurred with a view to the marriage—following in this, too, the civil law as to the *arrhae sponsalitae.* But in 1685 Graham's case[1] came before the Lords of Session, and we read that 'though they found *matrimonia debent esse libera*, and that there is a *locus poenitentiae*; yet under that pretence one ought not to be damnified, therefore they admitted her expense to probation; and she having proved that she was put to £80 Scots (about £7) of charges *eo nomine*, the Lords at the advising for that expense *and for her loss of market* modified £100 Scots (about £9) against him, in regard especially that he could give no rational ground why he gave over the bargain. This decision,' adds Fountainhall the reporter, 'seems equitable, though it be new.'

But even with the new equitable principle as to measure of damages, proof of some actual loss appears to have been necessary to maintain the action. The next case seems to have occurred in 1715[2] when a man sued under a written contract to marry with a penalty of £100 Scots 'adjected' thereto (!), but failed on the ground that no actual loss was proved, and in 1770[3] a fair plaintiff, bringing an action under more normal conditions, was also unsuccessful for the same reason. Technical proof of some trifling loss is, however, easily obtained, and this ineffective rule seems gradually to have become obsolete. By 1812[4] the Court of Session had accepted the new principle so thoroughly as to allow a verdict for £500 damages to stand, and four years later[5] confirmed another for £900. The 'equitable' exceptions had in fact swallowed the old rule, and the subsequent cases simply elaborate the new principle.

At about the same time and from the same equitable jurisdiction there appeared a twin action to this—the direct action for seduction. Till near the close of the seventeenth century

[1] M. 8472. [2] Young M. 8473. [3] Johnston M. 13916.
[4] Hogg, May 27, F. C. [5] Rose, July 19, 1816, F. C.

such an action appears to have been quite unknown, but in 1696 *Hislop* v. *Ker*[1]—a case of seduction under 'false and flattering insinuations'—came before the Lords, and they 'declared that they would allow damages against the man who had *dolose* induced a party to trust him,' and referred the damages to be assessed. The report is scanty, but it appears that the defendant had acted in bad faith throughout, and probably the merits of the case to some extent obscured the principle which the decision involved. That was to be more fully canvassed fifty years later in *Linning* v. *Hamilton*[2]. In that case, after various preliminaries, the lady had been awarded £200 damages for seduction, and the defender now appealed to the Lords to have the verdict set aside on the ground that no action lay, the pursuer contrariwise appealing for an increase of damages. It does not appear that there had been any promise of marriage—certainly no deliberate one—but the pursuer's character was apparently high. The principle of *ex turpi causa* was pressed upon the Court, and it had special force at a time when this kind of immorality was (by the 13th Act of the Reformation Parliament) a criminal offence. Against this, however, stood the actual merits of the case, the principle of actions *dolose*, and—with a force which we hardly appreciate now—the precedent of the Mosaic law which ordained that in the circumstances the man ought *stupratam aut nubere aut dotare*—to 'marry or tocher' her as the old Scots version ran. The Lords refused both petitions without answers, thereby 'adhering' to the judgment, and supporting the principle on which it was based. 'The Lords,' says Fountainhall, who reports the case most fully, 'were far from being unanimous. Those who were for damages founded their opinion upon discouraging vice, and no doubt the judgment in this case will put men more on their guard than formerly. But then it must have a bad effect on the female sex . . . Formerly,' adds the ungallant reporter, 'marriage was a woman's sole aim . . ., but now a woman has a wider field of action. Her first view is to engage the man's affections in order to entrap him into a marriage. If this fail, her second view after inflaming his desires is to yield to them, for which she is to be rewarded with a handsome portion.'

In 1785[3] the Lords again acted on the same rule, which henceforward may be considered as settled law, and the Legislature in making 'actions for damages on account of breach of promise of marriage, or on account of seduction' triable by jury[4], appears to have recognized the principle of this action, and to have confirmed

[1] M. 13908. [2] M. 13909. [3] *Buchanan* v. *McNab*, M. 13918.
[4] Court of Session Act 1825.

the practice of giving the jury a free hand in the assessment of damages.

Thus by processes widely dissimilar did breach of promise practice in England and Scotland come to much the same thing, the principal differences being that the provisions of the Evidence Amendment Act do not apply to Scotland, and that there, should the plaintiff fail on that action, she may nevertheless succeed on the supplementary one[1]. In practice the two are often brought together[2].

In England, on the other hand, the only action for seduction that exists is based on the right to the service of the seduced—real or fictitious—and is only maintainable by those who have been deprived of it. When once the action gets to a jury they have an unfettered discretion, and they are in fact frequently directed to take wounded feelings into account. But seldom does such an action get that length. On principle it is only competent when both the seduction and the resulting state which unfits for service happen in the same 'service,' in practice it is only brought by parents or guardians, and in fact the common law at this point is notoriously so riddled with exceptions and technicalities as to afford no protection worthy of the name.

By the law of France—with due regard to *la liberté illimitée qui doit exister dans les mariages*—the breach of a promise to marry does not give a right of action for damages, save only in so far as *préjudice* has thereby been caused to the other party, an exception based apparently on tort rather than on contract[3]. Such *préjudice*, however, is not limited to the narrow special damage of the civil law and the former law of Scotland[4]; it may be *moral* as well as *matériel*[5], and, in case of seduction, may even include consequent damage[6]. Damages, however, are only allowed in respect of such *préjudice* as is reasonably capable of commercial assessment, and no regard is paid to injured feelings or hypothetical loss—*ils sont réglés seulement à raison de la perte qu'elle éprouve*[7].

In Italy, on the other hand, the strictness of the earlier law still obtains, no action being maintainable *ex contractu* on the promise itself[8], and the damages recoverable (apparently *ex delicto*) being limited to the money loss directly sustained—*delle spese fatte per causa del promesso matrimonio*[9].

The evils which seem inseparable from our breach of promise

[1] *Gray* v. *Brown* [1878] 5 R. 971.
[2] *Paton* v. *Brodie* [1858] 20 D. 258.
[3] Pollock on Contracts, 5th ed. p. 316.
[4] Sirey & Gilbert's Code Civil, Art. 1142, notes 11 & 15.
[5] Ib. note 13.
[6] Ib. note 14.
[7] Ib. notes 16 & 18.
[8] Codice Civile Italiano, Art. 53.
[9] Ib. Art. 54.

litigation are notorious. In *Hall* v. *Wright*[1] a defendant tried unsuccessfully to plead the failure of his health as an excuse for the failure of his promise. But later litigants have always found it far more effective to direct their disparagements against the other party. The tactics are only too well known. The action affords an unrivalled vantage-ground for demolishing the character of a lost lover, and is consequently unequalled for black-mailing claims and for discreditable defences. Mr. Justice Mathew's cynical remark to a jury last year in one of the most mercenary of modern cases—a case, however, in which the defendant was eventually mulcted of several hundred pounds—that 'love is not a necessary element in a breach of promise case,' is true in more senses than the one in which it was uttered.

The irresponsible generosity of juries too, when, as in such cases, the measure of damages is quite arbitrary, is not only frequently very unjust, but generally, so far as it proceeds on any principle at all, seems to proceed directly at variance with the only intelligible one, namely, that seduction and actual out-of-pocket expenses apart, damages should be assessed upon what the Lords of Session somewhat coarsely called 'loss of market.' How different the practice! If the girl be pretty, the jury generally give her heavy damages; if she be unattractive, they often have a sneaking sympathy with the man. She who has her fortune still before her is handsomely recompensed, while her plainer sister, who could ill afford to lose the best years of her life, is often sent empty away. In fact the same girl would probably stand a better chance after a short engagement than at a later date when, after a long one, her charms had somewhat faded.

The question of a sweeping reform to a great extent depends upon whether damages should be obtainable for seduction, as in fact they often indirectly are in these cases. As usual, the accepted maxims do not help us very much. *In pari delicto potior est conditio defendentis* may be true as a rule of law and excellent as a principle of legislation, but though both parties may be *in delicto* they are seldom in anything like *pari delicto*. *Ex turpi causa non oritur actio*, but the 'turpitude' of a wronged girl is often of the most technical. Still, hard as it might prove in exceptional cases, such a system of damages should not be allowed.

In practice, as between the parties, the action affords opportunity for the exercise of vindictiveness rather than for the satisfaction of wrong, and, as regards the public, notoriety is given to a class of evidence and a species of relationships which should never obtain the sanction of the law. In all probability, too, the system goes

[1] E. B. & E. 746.

a long way to discourage honourable and disinterested attentions on the one hand, and to promote the completion of ill-assorted unions on the other. As for 'loss of market'—if *matrimonia debent esse libera* be the true principle of law (and I submit that it is), and if, as Lord Mansfield has said[1], 'it would be most mischievous to compel parties to marry who can never live happily together'—that equity is far outweighed by the others, and there should be, and there should be recognized to be, a 'place for repentance' up to the very moment when the knot is tied.

In 1878 the present Lord Chancellor (then Mr. Herschell) brought in a short Bill to abolish Breach of Promise Actions altogether, and that Bill reappeared in 1883 and 1884, and again in 1888 and 1890, Mr. Bryce, Mr. Caine, and Sir Roper Lethbridge being amongst those who backed it. But on no occasion did it attain to a second reading.

A resolution, however, in favour of abolishing the action 'except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss,' was introduced by Lord (then Mr.) Herschell, and carried in the House of Commons by 106 votes to 65 on May 6, 1879[2], and there are floating rumours of a Bill on these lines for next Session promoted by the same high authority. Such a change would apply the ordinary rule as to measure of damages to this class of actions, would tend to exclude all evidence save that of the promise, the breach of it, and the consequent money loss, and would in practice reduce these causes to the financial level of the County Courts. Involving as it would the abolition of what often really amounts to indirect damages for seduction[3], and of all personal considerations of a mercenary character, such a rule might press hardly in some few cases, but the general effect of it would be wholesome. It would, to a very large extent, mean the clearing away of judicial extensions of jurisdiction, and of inexpedient equities, and the restoring of the broad principles of an older and more universal law.

J. Dundas White.

[1] Quoted in *Atchinson* v. *Baker*, *supra*.
[2] Hansard, vol. ccxlv, pp. 1867-87.
[3] The proposal to make seduction under promise of marriage a misdemeanour seems more in harmony with the spirit of the law as to personal morality. But that is not yet.

IS A RIGHT OF ACTION IN TORT A CHOSE IN ACTION?

THE above question is raised in Sir Howard Elphinstone's late interesting article, intituled 'What is a *chose in action*[1]?' and the learned writer appears to be of opinion that it should be answered in the negative. For he takes objection, towards the end of his article, to the definition of a chose in action in such terms as to include rights against a tortfeasor; notwithstanding that such a definition is given both in Termes de la Ley and Blount's Law Dictionary. It is difficult, Sir Howard Elphinstone says, to see how rights against a tortfeasor can be regarded as property. It is difficult to class a mere expectation of damages among property, and if it is not property it is not a chose in action. Then he argues that rights against a wrongdoer are to be distinguished from rights under a contract, because the latter were indirectly assignable by power of attorney, while an assignment of rights against a tortfeasor was absolutely void, not only at law, but in equity, on the ground of champerty. And he concludes by stating that the phrase *chose in action* is never at the present day used in the meaning of a right of action in respect of a tort. There are, however, certain considerations, upon which Sir Howard Elphinstone did not touch, and which appear to me to make in favour of an affirmative answer to the question raised. What these are, I hope to be now permitted to state; and I shall endeavour to show that there is good reason and respectable authority, besides that of Termes de la Ley and Blount's Law Dictionary, for not limiting the term *chose in action*, even at the present day, so as to exclude a right of action in tort.

First, I think it will appear, on tracing the source of the term *chose in action*, that it is an elliptical expression for a thing lying in action. And a thing lying in action may, I think, be explained as a thing which it requires an action to recover or realize, if wrongfully withheld. And to recover or realize a thing would seem to mean to bring it into physical fruition, or to make it so ripe therefor that nothing is lacking to fruition of the thing but to take possession of it. The earliest allusion I have found to the distinction between things in possession and those in action[2] is

[1] L. Q. R. ix. 311 (Oct. 1893).

[2] There is no mention in Glanville, Bracton, Britton, or Fleta of any classification of things as being in possession or in action: but in the three last-mentioned works the difference is well marked between corporeal things in their owner's possession

in 22 Ass. pl. 37 [1], where it was said that the lord may seize what is in possession of a villein, as rent granted to him, of which he is seised, but the lord shall not have what remains in action to the villein (*ceo que demurt en action al villein*), as if obligation of debt or covenant or warranty be made to him. Coke, when citing the same case, remarks [2], 'But that which lieth in action, as a warranty made to the villein his heirs and assigns, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant or other thing in action made to the villein; because they lie in privity and cannot be transferred to others.' The term 'thing in action' is not often employed by Coke: but there are other references in his Commentary on Littleton to chattels or things, which consist, or lie or are in action [3]; and these seem to me to establish the identity of a thing in action with a thing lying in action.

There are also passages of Littleton and Coke which show that, in speaking of a *thing* in action, reference is especially made to the fruits of the action, to the thing recoverable by means of the action, and that damages (a word which, according to Coke [4], hath in the common law a special signification for the recompense that is given by a jury for a wrong) are properly included among such things. These passages are to be found in Litt. s. 503, and Co. Litt. 288 b, and they relate to the cases in which a release of all personal actions may be well pleaded in bar of a writ of error. Coke points out a diversity, when by the writ of error the plaintiff shall recover or be restored to any personal thing, as debt, damage, or the like;

and *mere rights* (of action or otherwise); Bract. fo. 10 b, 61, 407 b; Fleta, fo. 125, 126; Britt. liv. 1, ch. 29, s. 2, and liv. 2, ch. 2. ss. 1, 10. We learn from Bracton, too, that what may be termed things lying merely in action could not be bequeathed by will in his day. He points out (fo. 61, 407 b) that if debts due to a testator be not recovered by judgment or acknowledgment in his lifetime, the actions to recover them will pass to his heir: but debts so recovered are part of the testator's property and will go to his executors. And Littleton and Coke afterwards teach us (Litt. s. 504; Co. Litt. 289 a) that debts recovered by judgment are not things lying *merely* in action, for they can be reduced into possession without action, i.e. by levying execution. In Fleta (fo. 183) *actio* is mentioned amongst the things, which *nullo dari debent*.

[1] Abridged, Bro. Abr. Chose in Action, 8.

[2] Co. Litt. 117 a.

[3] See Co. Litt. 292 b, that rent reserved on letting land for a year 'is a thing not merely in action,' and that an annuity 'is not merely in action,' in each case, 'because it may be granted over.' See Co. Litt. 351 as to a husband's rights in his wife's 'chattels reals consisting merely in action,' 'chattels reals being of a mixed nature, viz. partly in possession and partly in action,' chattels real which 'were merely in action before the marriage,' and 'chattels personal, which be in action.' On comparing 10 Rep. 48 a with 3 Rep. 2 b, it appears that, when Coke speaks of a 'right to land in action,' he means 'a right, which consists only in action, *where the entry is tolled*.' Such a right ('for which the party hath no remedy but by action only to recover the land') is said to be 'a *thing* which consists only in privity, and which cannot escheat, nor be forfeited by the common law.'

[4] Co. Litt. 257 a.

for then the release of all actions personal is a good plea, for that the plaintiff is to recover or be restored to something in the personalty. And afterwards[1] he bids us note that an action real or personal doth imply a recovery of something in the realty or personalty or a restitution to the same. According to Coke, therefore, damage, or recompense for a wrong, is a thing recoverable by action in the personalty. It appears to follow that it is a personal thing in action. Brooke too, whose use of the term *chose in action* in his Abridgment shows that it was an established law term before Coke's day[2], appears to admit the right to bring an action of trespass to be a chose in action, though an uncertain one, not assignable even by the king[3].

The definition of a chose in action given in Termes de la Ley plainly includes a right of action in tort. Sir Howard Elphinstone however traverses this part of the anonymous author's explanation of the term upon the authority of Blackstone. Now Blackstone, instead of being contented to explain the distinction made by his predecessors between what is in possession and what lies in action, endeavoured to expand the difference so taken into an exhaustive classification of *property* in chattels personal. 'Property in chattels personal,' he says[4], 'may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment.' Later on, after admitting the right to recompense for a breach of contract, giving rise to a claim for unliquidated damages, to be a chose in action, he lays down that all property in action depends entirely upon contracts[5]. In making these statements Blackstone does not appear to be following any previous authority. These statements, however, seem to have prompted Sir Howard Elphinstone's argument above quoted, which we will now consider in detail.

As we have seen, Sir Howard Elphinstone says that it is difficult to class a mere expectation of damages among property, and if it is not property it is not a chose in action. But to this it may be objected, first, that the term *chose in action* was an established law term long before the word *property* came to be used in the wide sense of valuable things, in which it appears to be here employed[6]; so that it can hardly be accurate to require a right of action in tort to be included in property as a condition precedent to its being classed among things in action. And secondly, that rights of action for injuries to property have been expressly held to be

[1] Co. Litt. 289 a.
[2] Brooke died in 1558; Foss, Judges, v. 360.
[3] Bro. Abr. Chose in Action, 11, abridging Y. B. 5 Edw. IV. 8, pl. 22.
[4] 2 Black. Comm. 389.
[5] 2 Black. Comm. 397.
[6] See below, p. 146, n. 2.

included in the personal estate of the injured party, and to pass under the words 'personal estate' to his assignees in bankruptcy by virtue of the Bankruptcy Act of 1825[1]. And personal *estate* (in the wide sense of the word) appears to be exactly equivalent to personal property[2]. It will not, moreover, be disputed that under the present Bankruptcy Act, as under the Act of 1869, a bankrupt's rights of action for injuries to property pass to the trustee in bankruptcy. But there are no words in either statute to effect this, save the provision that the bankrupt's *property* (which expression is declared to include things in action[3]) shall vest in the trustee[4]. A man's rights of action for injuries to his property must therefore be necessarily included in his property, notwithstanding that the amount of the recompense to which he is entitled remains uncertain till a verdict be obtained. So that, even if we adopt Sir Howard Elphinstone's own test of a chose in action, rights of action for injuries to property appear to fulfil its requirements.

With respect to rights of action for injuries to the person or reputation, it is of course settled that they are so personal to the injured party that they are not included in the property which passes to his trustee in bankruptcy[5]. But it is submitted that such rights may nevertheless be aptly described as things in action, because the recompense for *any* wrong is a thing lying in action; and, as Blackstone himself is forced to admit[6], the right to compensation for a wrong arises immediately the injury is committed,

[1] See Stat. 6 Geo. IV, c. 16, s. 63; *Beckham* v. *Drake* (1849), 2 H. L. C. 579, at pp. 625, 626, per Parke B. 'The words "personal estate" clearly comprise all chattels, chattel interests, and all the subjects mentioned in the 12th section' (of Stat. 6 Geo. IV, c. 16); 'and they also comprise some rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate." For instance, some actions for tort do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.'

[2] See *Kirwan* v. *Johnson* (1651), Style 293; *Countess of Bridgewater* v. *Duke of Bolton* (Hil. 2 Anne), 6 Mod. 106; *Scott* v. *Albury* (Pasch. 6 Geo. I), Comyns, 337, 340; *Hogan* v. *Jackson* (1775), Cowp. 299, 306, 307; *Doe* d. *Wall* v. *Langlands* (1811), 14 East. 370, 12 R. R. 553; *Doe* d. *Morgan* v. *Morgan* (1827), 6 B. & C. 512; a succession of cases showing how, first, the word *estate*, and afterwards the word *property*, acquired in law the meaning of everything valuable which a man has. Brooke, who in his Abridgment uses *chose in action* as a well-known term, employs the word *propertie* in the sense of ownership only, in which sense it is used in the Year Books. See Bro. Abr. Propertie; Y. B. 6 Hen. VII. 7, pl. 4. Down to Coke's time and after, the proper legal description of everything a man had was all his lands, tenements and hereditaments, goods and chattels; and real and personal estate hardly became established law terms before the reign of Charles II; see the authorities cited in Williams, Real Property, pp. 25–28, 17th ed.

[3] See Stats. 46 & 47 Vict. c. 52, ss. 20, 44, 50 (5), 54, 57 (2), 168; 32 & 33 Vict. c. 71, ss. 4, 15, 17, 22.

[4] See *Seear* v. *Lawson*, (1880) 15 Ch. D. 426; *Guy* v. *Churchill*, (1888) 40 Ch. D. 481, 487.

[5] *Ex parte Vine, Re Wilson*, (1878) 8 Ch. D. 364.

[6] 2 Black. Comm. 438.

although the amount of the damages is not ascertained before verdict. Indeed, Blackstone ranks damages for a wrong under the head of '*property* acquired by suit and judgment at law[1].' Surely a thing which is acquired by suit must be a thing lying in action; and as Blackstone shows, the judgment (which ends the action[2]) neither confers the title to the damages, nor ascertains their amount. What good reason is there then for discarding the authority of Brooke, Coke, and Termes de la Ley in favour of Blackstone's peculiar limitation of the term *chose in action*? And does not Blackstone's own explanation show that recompense for a wrong is a thing in action? Whether the recompense for any injury to the person is a thing in action assignable before judgment is another question, which, as will appear from the note at the end of this article, has been decided in the United States in the negative.

The distinction which Sir Howard Elphinstone makes between rights of action *ex contractu* and those *ex delicto*, on the ground that the former were indirectly assignable, while the latter were not, raises the interesting question, how far a right of action in tort is assignable at the present day. The authority cited by the learned writer for his statement that an assignment of rights against a tort-feasor 'was' (I notice that he does not say 'is') absolutely void at law is Y. B. 34 Hen. VI. 30, pl. 15. In this case Littleton, for the plaintiff, argued that no duty to another could be granted over, no more in the case of a duty arising from contract than, if one did trespass to him, he could assign the money which he might recover for the trespass; and Wangford, for the defendant, maintained that the duty of a thing which is certain could be well assigned, but conceded that a duty of a thing which is not certain, as in the case of trespass, could not be assigned. It is to be remarked that at this early period the right to assign a chose in action in contract was anything but firmly established; indeed the very case cited was an action brought against the assignee of a debt for maintaining the assignor in his suit against the debtor. Nor is champerty mentioned in the arguments quoted as the reason why the money to be recovered as damages for trespass should not be assignable. So that upon the whole the authority cited does not throw much light upon the possibility of assigning a right of action in tort in modern times, when it became settled that a chose in action might well be assigned by power to sue in the assignor's name. There is no doubt, however, that the test propounded by Wangford of the certainty or uncertainty of the thing has been adopted to a certain

[1] 2 Black. Comm. 438.

[2] Co. Litt. 289 a.

extent. Thus, as we have seen [1], even the king could not assign a right of action for a trespass done to him, on account of the uncertainty of the thing. So the *chattels* forfeited to the Crown upon outlawry or conviction of felony comprehended all rights of action upon contract, though for unliquidated damages, upon the ground that in such actions the measure of damages is certain [2]; also, it seems, all causes of action for deprivation of, or injury to, the outlaw's or felon's goods, where the measure of damages is the value or the diminution of the value of the goods [3]: but not a right of action for damages wholly uncertain, as in trespass *qu. cl. fr.* [4] We may note here that the authorities cited upon the law of forfeiture seem to countenance the proposition, that rights of action for injury to goods, where the measure of damages is certain, are things in action forming part of the personal estate or property which was forfeited upon outlawry or conviction of felony; so that the law of forfeiture, as well as the law of bankruptcy, affords material for maintaining that, at least, rights of actions for injuries to property are things in action. But to return to the point, the solution of the present question appears to depend upon the following principles:—(1) Any agreement to maintain another person's action in consideration of receiving part of the land, debt, or other thing in suit, is void for champerty. (2) At the same time 'the assignment *pendente lite* of the subject of a suit is not champerty or in any way illegal, even though the assignor gives the assign a power of attorney to sue in his name, and agrees that he will not impede, but will assist the assign [5]. (3) A mere right of suit in equity, not coupled with or incidental to an interest in property, as a mere right of suit to set aside a release obtained by fraud, is not assignable [6]. (4) The policy of the bankruptcy law is to make everything, which vests in a trustee in bankruptcy, saleable by him; every right of action, in tort or otherwise, which vests in a trustee, is therefore assignable over by him, even though it might not have been assignable by the bankrupt himself [7]. It may be added that the law of champerty remains unaffected by anything in the Judicature Acts [8]. I do not propose to examine in detail the

[1] *Ante*, p. 145.

[2] *Batty* v. *Fay* (1795), Ridgeway, Lapp & Schoales, 511.

[3] Co. Litt. 128 b; 3 Leon. 205, pl. 261; Hawk. P. C. bk. ii. ch. 49, s. 9; *Bullock* v. *Dodds* (1819), 2 B. & A. 258, 276.

[4] *Fleming* v. *Smith* (1861), 12 Ir. Com. Law Rep. 404.

[5] See per Kay J., *James* v. *Kerr* (1889), 40 Ch. D. 449, 456, 457, for authority for both the above propositions.

[6] *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481; *De Hoghton* v. *Money* (1866), L. R., 2 Ch. 164, 169; *Hill* v. *Boyle* (1867), L. R., 4 Eq. 260.

[7] *Seear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1888), 40 Ch. D. 481.

[8] See *Ball* v. *Warwick* (1881), 50 L. J., C. P. D. 382; *James* v. *Kerr* (1889), 40 Ch. D. 449; *Guy* v. *Churchill* (1888), 40 Ch. D. 481, 485.

authorities for these propositions, but the following cases appear to throw some light on the object of our inquiry. In *Simpson* v. *Lamb* (1857), 7 E. & B. 84, the plaintiff, in consideration of £50 paid to him by his attorney in the action, assigned to the attorney, before judgment in the action, the benefit of a verdict for £50 damages given in his favour (whether in contract or tort appears not). This assignment was held void, because no attorney is permitted to purchase anything in litigation, of which he has the management, *whatever might have been the case had the purchase been by a stranger*. In *Anderson* v. *Radcliffe* (1858), E. B. & E. 806, the plaintiff in ejectment, after a verdict in his favour but before judgment, gave his attorney a bill of sale by way of mortgage for £100 on a crop of potatoes growing on the land. This was held valid, a distinction being taken between an absolute conveyance of the matter in suit to the attorney in the action, and an assignment of the same by way of security. In *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262, an undischarged bankrupt was carrying on business on his own account. In the course of such business, he became possessed of some goods, which were wrongfully taken away from him. He sued the taker for wrongful conversion of the goods, but finding that he had no money to carry on the action, he assigned the cause of action to Cohen in consideration of the money then due to him, and further sums necessary to carry on the action. The action resulted in a verdict for £120 against the taker of the goods. Before the money was paid, the trustee in the bankruptcy of the undischarged bankrupt intervened and claimed the amount of the verdict from the taker; who interpleaded, paying the money into Court. And the issue was tried, whether Cohen or the trustee was entitled to the money, and was found both by Mathew J. and the Court of Appeal for Cohen, on the ground that the intervention of the trustee was too late. But although the trustee fought the case to the Court of Appeal, it does not appear that any suggestion was made on his behalf that the assignment to Cohen of the cause of action (which was of course in tort) was void for champerty or on any other ground; nor did it occur to any of the learned judges [1], who decided the case on appeal, to question the validity of the assignment. On the contrary, the very ground of their decision was that the bankrupt had made a valid assignment of his cause of action, and this was exactly what barred the trustee's intervention. It appears from this last case therefore that a right of action sounding in damages for wrongfully withholding goods (where the measure of damages is, as a rule, the value of the goods) may be

[1] Lord Esher M.R., Fry and Lopes L.JJ.

lawfully assigned over. If so, between such rights of action and rights of action *ex contractu*, the distinction alleged by Sir Howard Elphinstone does not seem to obtain. It is a possible inference from the cases of *Simpson* v. *Lamb* and *Anderson* v. *Radcliffe* that the recompense due for any wrong may well be assigned over (except to the plaintiff's solicitor absolutely) as soon as the damages are ascertained by verdict; from which time until judgment, it may be remarked, the thing still remains merely in action[1]. But it is questionable whether the plaintiff in an action for injury to the person can have anything assignable before judgment: while it is arguable that a right of action for any injury to property ought to be assignable before verdict[2]. In truth, it appears to remain an undecided question, to what extent the modern principles of the assignability of a chose in action and of the subject of a suit are applicable to an action at law to recover damages for a wrong. And notwithstanding the sweeping remarks of Lord Abinger in his judgment in *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481, 497, 499[3], I think that it should not be assumed without argument that this question must necessarily be answered altogether in the negative. The inference to be drawn from the case of *Cohen* v. *Mitchell* is against a negative answer in the case of actions for wrongfully taking or withholding goods, where the measure of damages is the value of the goods. Take further the case of actions for spoiling goods, where the measure of damages is the diminution in value of the goods. Do the principles stated above prohibit the assignment, upon the sale of damaged goods, of the right to recover compensation for the injury which they have sustained? Nay, may it not be inferred from the settled principles of the law of insurance that there is nothing obnoxious to public policy in such an assignment of a mere right of action? The insurer of a house, a ship, or other goods, who has paid on a total or partial loss, is subrogated to all

[1] Co. Litt. 289a. It should be noted, however, that in modern practice, the recompense for a tort is not only reduced to certainty, but also to a certain extent placed in security by verdict; as if either party die after verdict but before judgment, judgment may nevertheless be entered up, although the cause of action do not survive; Stat. 17 Car. II. c. 8, s. 1; *Palmer* v. *Cohen* (1831), 2 B. & Ad. 966; *Kramer* v. *Waymark* (1866), L.R., 1 Ex. 241; Rules of the Supreme Court, 1883, Order XVII. r. 1. But there is no debt due to the plaintiff from the defendant in an action of tort until judgment is signed, even though the damages may have been ascertained by verdict; *Ex parte Clarke* (1811), 14 East 197. Nor are damages ascertained by verdict provable in the defendant's bankruptcy, unless judgment be signed before he be adjudged bankrupt; *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494.

[2] See the American cases cited in the note at the end of this article.

[3] 'It is a rule not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. . . . Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.'

other rights of compensation which the insured may have. He is therefore entitled in equity to maintain in the name of the insured any action for damages which the latter may have against any other person for injuring the thing insured. Thus if a ship insured against collision at sea be run down by the fault of another owner's vessel, underwriters, who have paid for the loss, are entitled to maintain in the name of the insured all the latter's remedies to recover damages for the collision[1]. What is this but the assignment, by the effect of a mere contract, of a right of action in tort[2]? And if it were to be held that rights of action so assignable by subrogation may not be assigned directly, would not that lead to the following absurd result, namely, that a man might lawfully contract to compensate another for a future wrong on the terms that he should succeed on payment to the other's rights of action against the wrongdoer, but he might not lawfully agree to compensate the other for a past wrong on the same terms?

There are of course strong arguments against holding that the right of action is assignable in the case of injuries to the person or reputation, for which the damages are altogether uncertain, are not to be measured by any standard of loss or diminution in value of property, and include compensation for bodily harm or annoyance, and which create an obligation so personal to the parties united thereby that it remains unaffected by the bankruptcy, and is destroyed by the death of either, and is not transferable on the outlawry of the injured party.

I have considered the present question quite apart from the provisions of the Judicature Act of 1873, which render a 'debt or other legal chose in action' directly assignable[3], because it does not appear that those provisions contain anything to affect the law of maintenance or champerty, or any other rule of public policy against the assignment of a right of action in tort[4]. It could not, I think, be maintained that the Act in question makes valid the direct assignment of any chose in action, of which the indirect assignment was previously prohibited by law. But it may well be contended that, if in any case a right of action in tort be assignable at all, it will then be directly assignable as a legal chose in action by virtue of the enactment referred to.

[1] See *Randal* v. *Cockran* (1748), 1 Ves. Sen. 98; *Mason* v. *Sainsbury* (1782), 3 Doug. 61, 64; *Yates* v. *Whyte* (1838), 4 Bing. N.C. 272, 283, 284; *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, 284–6, 290, 291, 293, 295; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, 388, 403, 404.

[2] Per Lord Blackburn, 3 App. Cas. 293: 'It is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters.'

[3] Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

[4] See *ante*, p. 148.

Lastly, with regard to Sir Howard Elphinstone's statement that the phrase (chose in action) is never at the present day used in the meaning of a right of action in respect of a tort. In the argument for the plaintiff in error in the case of *Rogers* v. *Spence* (1846), 12 Cl. & Fin. 700, at p. 705, the right to bring trespass *qu. cl. fr.* was spoken of as 'a chose in action,' and 'a chose in action in tort[1].' And in *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234, the right of any liquidator, creditor, or contributory of a company being wound up to proceed against any director of the company for a misfeasance[2] was expressly held by the Court of Appeal to be a thing in action of the company. It is submitted upon these authorities that modern practice has not departed from the ancient usage of the term *chose in action* as explained in Termes de la Ley; but that the phrase in question may still be well applied to a right of action in tort.

I may perhaps be permitted to add something with regard to Sir Howard Elphinstone's statement that *chose in action* in its widest sense would appear to include a specific chattel which is out of its owner's possession, though the term is not now commonly used with such a meaning. The only authority for applying the term *chose in action* to a chattel bailed by or taken from its owner appears to be Y. B. 9 Hen. VI. 6, pl. 64, in which case Paston J. seems to have suggested that if the owner of a box of deeds bailed it to another, and the other delivered it over to a sub-bailee, the box would be in action to the first bailee. Brooke's abridgment of this case (Chose in Action, 13) led Lord Justice Fry to state (30 Ch. D. 288) that in 9 Hen. VI. the property in deeds in the hands of a third person was considered as a *chose in action*. On reference to the Year Book, however, it appears that Paston's *dictum* does not warrant this statement, and that he clearly recognized that if the *owner* of chattels bailed them, he would retain the property in them. It is true that at one time a man deprived of his goods by a trespasser was considered to retain a mere right of action against the trespasser personally; but at that time the former was held to lose all right to the goods[3], so they cannot then have been *his* things in action. It is submitted that in modern law, at all events, the owner of a corporeal chattel, which is in another person's possession either through bailment or wrongful taking, has not a mere *chose in action*; the thing is not merely in action to him. It has always been admitted that a bailor retains

[1] There are also several instances of the application of the term *chose in action* to a right of action in tort in the American cases cited in the note at the end of this article; see especially *The People* v. *Tioga C. P.*, 19 Wend. 73, 75.

[2] Stat. 25 & 26 Vict. c. 89, s. 165.

[3] See 27 Ass. pl. 64; Y. B. 2 Hen. IV. 12, pl. 51; Finch, L. Bk. iii. ch. 6.

the property in the chattels bailed [1]; and it also came to be allowed that, where goods were taken by a trespasser, the owner retained the right of property in them, which right he might assert by retaking the goods, wherever found [2]. Also, according to Littleton [3], if I have a cause of action in detinue against another, and I release to him all personal actions, I may nevertheless retake my goods from him, because no right of the goods is released to him. Could this be so if the thing were merely in action to the releasor? Again in *Sir T. Palmer's case*, 5 Rep. 24 b, Sir T. P., seised in fee of a great wood, sold to *C* and his assigns 600 cords of wood, to be taken by the assignment of Sir T. P.; and it was held that *C* had an interest which he might assign over, and not a thing in action, or a possibility only; for it was resolved that if Sir T. P. did not assign them to *C* on request, *C* might take them without assignment. By the common law, too, a husband became absolutely entitled to his wife's personal things in possession on marriage, but for her choses in action they must as a rule have jointly sued [4]. Now if the goods of a single woman were wrongfully distrained or taken from her or bailed by her, and she afterwards married, her husband alone could sue in replevin or detinue, or release her right to the goods [5]. In *Franklin* v. *Neate* (1844), 13 M. & W. 481, moreover, it was contended that the owner of a pawned chattel had but a *chose in action*: but the contrary was decided. It is further submitted that the term *chose in action* points to the personal duty to be exacted by action (see Termes de la Ley, *sub verb.*), and is therefore improperly applied to such a right as the ownership (without possession) of a chattel, which right, although a bare right, is realizable by taking the thing, wherever found. Even debt and damages recovered by judgment, though not realized by execution, are not things lying merely in action [6]. Sir Howard Elphinstone states generally that bailed chattels cannot be seized under a *fi. fa.* issuing under a judgment against the owner. But it seems that the sheriff may seize and sell chattels bailed, of which the owner is entitled to resume possession at will, in execution of a judgment against the owner: though it is otherwise of chattels pawned or

[1] See Glanv. x. 13; Bract. fo. 151 a; Y. B. 48 Edw. III. 20, pl. 8; 2 Edw. IV. 5, pl. 9, per Needham J.

[2] See Y. B. 19 Hen. VI. 65, pl. 5, per Markham; 32 Hen. VI. 1, pl. 3; 6 Hen. VII. 7, pl. 4; Litt. s. 497; *Chapman* v. *Thumblethorp*, Cro. Eliz. 329.

[3] Sect. 498.

[4] Co. Litt. 351 b.

[5] Fitz. Abr. Replevin, 43; Moore 25, pl. 85; Bac. Abr. Detinue (A). The husband and wife must have joined in suing in trespass or trover for taking or converting the wife's goods before the marriage, because in these actions the plaintiffs disaffirmed the property in the goods, and sued for damages only; *Powis* v. *Marshall*, Sid. 172, 1 Keble 641.

[6] *Ante*, p. 143, n. 2; see also 1 Rop. Husband and Wife, 212.

hired or otherwise in the exclusive possession of the bailee [1]. There is, however, some analogy between chattels bailed and things in action with regard to their assignment [2].

T. Cyprian Williams.

Note.—The question of the validity of an assignment of a right of action in tort has received some consideration in the United States. It is laid down in Story's Equity Jurisprudence (§ 1040 g, vol. ii. p. 359, 13th ed. by Bigelow) that a mere right of action for a tort is not assignable; and his editors (*ib.* note b) merely draw the distinction that 'it seems otherwise of a right of action for goods converted, *where the tort is waived*.' But such of the American authorities as I have been able to examine do not throw a clear light upon the most important part of the question, namely, to what extent an assignment by power of attorney of a right of action in tort is valid. Thus the authority Story cites for his proposition is *Gardner* v. *Adams* (1834), 12 Wend. 297, in which a right of action in trover was held to be 'no more assignable than a right of action for any other tort—an action of trespass for instance, or an assault on the person.' But in that case the assignee was suing in his own name. And it was accordingly said by Cowen J., in *The People* v. *Tioga C. P.* (1837), 19 Wend. 73, 77, that '*Gardner* v. *Adams* merely declares that a tort is not assignable *so as to warrant an action in the name of the assignee*.' In *The People* v. *Tioga C. P.*, it was held that a right of action by a master for loss of his female servant's services by her seduction could not be so effectively assigned by power of attorney as to prevent the assignor from afterwards releasing the judgment to the tortfeasor, though the latter had notice of the assignment. The main ground of the judgment was that, as the action was for personal injury, and the right of action was so personal to the injured party as not to be transmissible on his bankruptcy or death, he could not transfer the duty created by the wrong. But the learned judge admitted a distinction between actions for personal injuries and actions for injuries to property; and he cited an earlier case of *North* v. *Turner* (1823), 9 Serj. & Rawle, 244, in which it was held that a right of action in trespass *de bonis asportatis* was assignable in equity. And as he suggested that the assignee's remedy was to sue the assignor for a breach of his implied agreement to do nothing to prevent the assignment from being effectual, he can hardly have considered that the contract of assignment was void for maintenance or champerty. In *Thurman* v. *Wells, Fargo & Co.* (1854), 18 Barb. 500, it was alleged that one Spencer delivered gold-dust and coin to the defendants as common carriers, and that they behaved so negligently that the goods were lost, and Spencer assigned the cause of action and his ownership

[1] Bro. Abr. Pledges, 28; *Duncan* v. *Garratt* (1824), 1 C. & P. 169; *Balls* v. *Thick* (1845), 9 Jur. 304; *Rogers* v. *Kenny* (1846), 9 Q. B. 592.
[2] See *Burn* v. *Carvalho*, 4 My. & Cr. 690.

of the goods to the plaintiff. And it was held that the plaintiff could not sue the defendants *in his own name* upon the cause of action so assigned under the New York Code; because that code does not make directly assignable any right of action, which was not indirectly assignable at common law, and the right of action being in tort was not assignable at common law. Brown J., speaking of the assignment of rights of action, said, 'I think this cannot be done in cases where the thing assigned consists of a mere right of action for an unliquidated unrecognized claim arising *ex delicto*, and of which there can be no possession and nothing resembling a possession, and no capability of enjoyment. If this class of claims are to be the subject of sale, assignment, and transfer, so as to enable the assignees to institute suits in their own name, and call the assigners as witnesses to make out the causes of action, then we have entered upon a new epoch in the history of civil jurisprudence.' In that case, however, the plaintiff sued in his own name, and it was sufficient to bar his action that he had no right so to sue either under the New York Code or at common law. The action assigned, moreover, was for the wrong, not of taking or damaging goods, but of negligence in the performance of a common carrier's duty. As to the learned judge's objection to the assignment of a cause of action and calling the assignor to sustain it, that appears to have reference to the common-law rule not admitting the evidence of the parties to an action. When this rule prevailed in England, it was held to be maintenance to assign a cause of action, even on contract, with the mere object of letting in the assignor's evidence; *Bell* v. *Smith*, 5 B. & C. 188, 194. But of course such an objection to the assignability of a right of action in tort loses its point when the law no longer rejects the evidence of the parties to an action. In *M'Kee* v. *Judd* (1855), 2 Kern. 623, a right of action in trover was held, by five judges against two, to be assignable; so that the assignee might sue in his own name under the New York Code. In *Rindge* v. *Inhabitants of Coleraine* (1858), 11 Gray 157, injury was done to a horse while in the possession of a hirer. He settled with the owner for the damage upon an agreement that he should sue the tortfeasor for his own profit in the owner's name. This agreement was held not to be tainted with champerty; chiefly, it appears, on the ground that the hirer of the horse had an interest in the claim for damages. In *Davis* v. *Herndon* (1860), 39 Miss. 484, it was held that a right of action in trover was not assignable so as to enable the assignee to sue in his own name. In *Rice* v. *Stone* (1861), 83 Mass. 566, a claim for damages for personal injury was held not to be assignable in equity before judgment, even after verdict; the Court basing its judgment to a great extent on a previous case of *Stone* v. *Boston & Maine Railroad* (1856), 7 Gray 539, in which it was held that a claim against a railroad corporation for injury to the person did not pass by an assignment of his estate under the Massachusetts insolvent laws before recovery of judgment, though a verdict had been found for the plaintiff before his insolvency. But as in *The People* v. *Tioga C. P.*, the Court in *Rice* v. *Stone*

admitted a distinction between actions for personal injuries and actions for injuries to property. The case of *North* v. *Turner*, *ubi sup.*, was mentioned without disapproval. Of *Gardner* v. *Adams*, *ubi sup.*, it was remarked, 'The question does not appear to have been much discussed, and the authority of the case is less valuable on that account. *The People* v. *Tioga C. P.* was argued by able counsel, and appears to have been thoroughly discussed.' But *Rice* v. *Stone* was followed in *Linton* v. *Hurley* (1870), 104 Mass. 353, in which case however it did not appear at what stage of the action the assignment was made. In *Grocers' Bank* v. *Clark* (1866), 48 Barb. 28, a right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association was held to be assignable, and *therefore* to have passed as *assets* under a statute vesting all the injured person's assets in the plaintiff. In *Hawk* v. *Thorn* (1869), 54 Barb. 164, the claim was that the defendants had wrongfully taken and sold a calf consigned to the plaintiff by its owner, and had received a certain sum being its value, and therefore a cause of action arose to the owner for the sum so received by the defendants, and the owner had assigned his claim to the plaintiff. It was held that the plaintiff might well sue, Cardozo J. saying, 'When a person has unlawfully taken possession of another's property, the tort may be waived and an action brought for its value. Such a cause of action is assignable.'

Two cases are cited in note (b) to Story, Eq. Jur. § 1040 g, 13th ed., to the reports of which I have been unable to obtain access—viz. *Dunklin* v. *Wilkins*, 5 Ala. 199, and *Dickinson* v. *Seaver*, 44 Mich. 624. Apart from these cases, however, it appears to me that the American authorities cited in the present note do not altogether bear out the proposition laid down by Story, but rather favour the conclusion that a man's right of action for injuries to his property are part of his property and therefore assignable in equity, while the obligation arising from an injury to the person or reputation is too personal to the parties affected thereby to be the subject of assignment. I cannot find that any attempt was made in any of the cases cited to argue by analogy to the assignment of a right of action in tort by subrogation under a contract of insurance: but such an argument obviously makes in favour of a similar conclusion. A perusal of the judgments in the American cases will show that there has been a tendency to take the rule of the devolution of rights of action on bankruptcy as a guide. It has at all events been considered that rights of action which do not devolve either upon a trustee in bankruptcy or an executor cannot be assignable: though in the case of *Grocers' Bank* v. *Clark* the argument was in a manner reversed, and it was held that a right of action for an injury to property was assignable, and therefore passed among the injured party's assets. In this country, however, the argument from analogy to the law of bankruptcy is open to the objection that it has been held in the above-cited case of *Seear* v. *Lawson* (*ante*, p. 148) that such rights of action as devolve upon

a trustee in bankruptcy are assignable by the policy of the statute law of bankruptcy, although they might not have been assignable by the bankrupt himself. But in my humble judgment a better test of the assignability of a right of action in tort may be found by referring to the doctrines of the common law. This is simply the rule propounded by Wangford so long ago as the 34th Hen. VI, that the duty of a thing which is certain may well be assigned over, coupled with the explanation afterwards adopted in determining the law of forfeiture on outlawry, that a right of action sounding in damages may be said to be certain when the measure of damages is certain. By the ancient common law, the king only could assign a chose in action directly, and he could generally assign whatsoever things were forfeited to him on outlawry or for felony; 17 Vin. Abr. 87, 88 (Prerogative M. b. 17). In the modern common law it was established that a common person might assign a chose in action indirectly by empowering the assignee to sue in his name. By the ancient common law, the limit of the king's power of assigning a chose in action was determined by the certainty or uncertainty of the thing (*ante*, pp. 145, 146), and for the purposes of this limitation it appears that damages are a certain thing when their measure is certain. Is there any good reason why the same test should not be applied to ascertain the limits of a common person's power of indirectly assigning a chose in action? Especially when the settled law as to the assignment of a right of action in tort by subrogation points to the same rule; subrogation being a consequence of a contract of indemnity, and indemnity being only possible against a pecuniary loss measured by injury to or loss of property. And by what authority are our Courts concluded from applying such a test?

T. C. W.

A CHAPTER IN THE HISTORY OF THE LAW OF LIBEL.

MOST writers accept the distinction so clearly drawn in English law between written and spoken scandal as a *real* difference, arising from the nature of things, and learned explanations are given of the necessity that existed 'from the earliest times' of regarding 'libel' as an injury of a 'greater and more aggravating nature than slander,' and therefore a cause of action in itself, independent of damage. As a matter of fact the distinction is entirely modern, accidental and insular. As late as 1812, Sir James Mansfield, Chief Justice of the Common Pleas, expressed strong doubts. Although compelled by weight of authority to decide in favour of the plaintiff in *Thorley* v. *Lord Kerry*[1], he said, 'The words if merely spoken would not be of themselves sufficient to support an action. But the question now is whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken: and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point whether there be any distinction as to the right of action between written and parol scandal. . . . For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken.' Insular the distinction also is, for it is not to be found in the Roman law nor in those great systems of law which on the continent and in Scotland are based on that law. The point is not altogether an academic one, for on this artificial distinction is based a large portion of the law of libel as it applies to newspapers, and although the hardship of the law as laid down in *Purcell* v. *Sowler*[2] has been somewhat mitigated by the Libel Acts of 1881 and 1888, there is still a feeling of grievance amongst those responsible for the conduct of our public newspapers at a distinction which, they say, discriminates unfairly against them. The burden of this grievance was expressed as follows in a paper read by the present writer at the last conference of the Institute of Journalists in Lincoln's Inn Hall.

'And here comes in our complaint against English law, not that it punishes defamation too severely, but that, in one great class of cases at least, it punishes the wrong man, and that man the journalist. If a speaker at a public meeting, speaking with the utmost deliberation, and with the knowledge that his words

[1] 4 Taunt. 355, 13 R. R. 626 (1812).

[2] 2 C. P. D. 215 (1877).

are being taken down for publication in the newspapers, makes by accident or by design an incorrect or an untruthful statement in dispraise of an opponent, and yet so frames his words that, in the absence of special damage he does not expose himself to an action for slander, that speaker goes free and unpunished. It may be right or it may be wrong—on that I express no opinion. But, mark the difference when the journalist comes on the scene. The words have been taken down and published. It is clearly not the business of the reporter or of the editor to sit in judgment on the speaker. They have neither the material nor the time for such an investigation. Their duty is to photograph the meeting, to pass it on to the public, for whom it was intended. Let the public judge between the speaker and his adversary, and if the accuser cannot justify his charges, let him suffer the consequences. But no, says the law, "These words in passing into print have become actionable; with the speaker, the author and publisher of the words we have nothing to do; it is for you, the journalist, to justify them by proving that they were of public concern, and that their publication was for the public benefit." . . . Two judges of the final Court of Appeal have recently laid it down as their opinion that a newspaper publishing a complete and accurate version of a judge's judgment, might find itself the defendant in an action for libel, "to which the supposed privilege in what was said by the judge would be no answer" (*Macdougall* v. *Knight*, 14 A. C. 194). And so we arrive at this extraordinary piece of topsy-turveydom. The statesman prepares his speech and the judge his judgment; each, let us hope, has carefully weighed his words before passing them on to the journalist, whose sole business and duty it is to present them to the public faithfully and accurately. Yet if the statesman or the judge has made a mistake, or committed a fault, he goes scot free, while the journalist has to pay the penalty.'

When I say that no system of law but the English recognizes this distinction, I do not of course mean that slander reduced to writing may not be regarded as a much more serious offence than oral slander, and consequently as one calling for a heavier punishment. It is, in fact, in all cases an aggravation of the offence; in no case is it an essential element on which to base a right of action. In the Roman law of the Twelve Tables[1] public affronts and accusations, whether oral or written, were punishable with death, and if under the later emperors, the law against the *libellus famosus*

[1] Our knowledge of the text of Table VIII which deals with this matter is very fragmentary, consisting chiefly of references to it in much later writers. Bruns, Fontes Juris Romani Antiqui (Tübingen 1871), has collected all the learning on the subject in his note on p. 20. Cicero, De Republ. 4. 10, professes to give the exact words—'si quis occentavisset sive carmen condidisset quod infamium faceret flagitiumve alteri.' The punishment is thus described by another writer, 'fustuarium supplicium constitutum erat in auctorem carminum infamium.' Bruns gives two fragments, 'qui fruges excantassit' and 'qui malum carmen incantassit,' which seems to suggest that the real offence punished by beating to death was incantation or witchcraft directed against a man's person, goods or crops, rather than mere defamation.

was still very severe, it must be remembered that this was a production in its nature and essence anonymous and scurrilous, bearing no resemblance to the early English pamphlets and newssheets which the Star Chamber endeavoured, as we shall see, to suppress by a revival of the Roman law. Defamation as defined by Justinian (Digest xlvii. x. *De Injuriis et Famosis Libellis*, s. 5) was simply a variety of *injuria*, and might be either oral or written, and the modern French and German Codes faithfully follow their great original in this respect.

The French jurists have split up the offence into two grades—'diffamation' and 'injure.' The classical definitions of these are to be found in the law of May 17, 1819, which has remained unchanged. In section 13, 'Defamation' is defined as 'Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé;' whilst 'insult' is 'Toute expression outrageante, terme de mépris ou invective qui ne renferme l'imputation d'aucun fait.' These offences may be committed by any of the following means: 'Soit par des discours, des cris, ou menaces proférés dans les lieux ou les réunions publiques, soit par des écrits, des imprimés, des dessins, des gravures, des peintures, ou emblèmes vendus ou distribués, mis en vente ou exposés dans les lieux ou réunions publiques, soit par des placards et affiches exposés au regard du public.' There is certainly no trace in all this of any essential and fundamental distinction as to right of action between written and parol scandal. Nor will the German *Strafgesetzbuch* of 1876 help our English lawyers to discover some basis for the distinction. The classification is, as might be expected, a severely scientific one. Section 186, under the title 'Beleidigung,' defines the offence thus: 'Whoever asserts or circulates an allegation of fact (*Thatsache*) concerning another, which is calculated (*geeignet*) to make him contemptible or to lower him in public opinion, shall be guilty of defamation, unless he can prove the truth of his assertion (*wenn nicht diese Thatsache erweislich wahr ist*).' It is provided that the penalties shall be higher when the defamation takes place 'publicly or by the circulation of writings, pictures, or representations.' The following section defines the more serious offence of 'calumnious defamation' (*verläumderische Beleidigung*), which is committed when any one makes or circulates about another, with knowledge of its falsehood (*wider besseres Wissen*), an untrue assertion, calculated to make him contemptible, or to lower him in public opinion, or to injure his credit. The punishment is again higher in case of writing, but the cause of action is the same. In each case if the complainant has suffered in his property, his business, or his advancement (*Vermögensverhältnisse, Erwerb,*

Fortkommen) he can also, at the same trial, obtain from the defendant a money penalty. The law of Scotland also follows the Roman and makes the difference between 'scandal' and 'scandal reduced into writing and published or circulated,' simply one of degree.

Where, then, are we to look for the origin of this distinction in our English law, and how comes it, especially, that a nation which justly boasts of having been the first to proclaim the absolute freedom of the press from all censorship or previous restraint, should be the only one to invent a new and illogical distinction aimed solely against the press? The very interesting argument in *Thorley* v. *Lord Kerry*, already referred to, throws no light on the point. Mr. Barnewall for the plaintiff in error cites Rolle's Abridgement and Comyn's Digest as proving (and Chief Justice Mansfield agrees) that neither of these authorities recognizes the distinction, and that all the older cases treat writing and parol on the same footing, but he could not get over *King* v. *Lake*[1] and the long list of succeeding cases cited in opposition. Mr. King was a very litigious barrister of Charles the Second's time, who claimed that he was 'damnified in his good name and credit and profession' by Sir Edward Lake writing of a certain petition drawn up by him that it was 'stuffed with illegal assertions, ineptitudes and imperfections, and clogged with gross ignorances, absurdities, and solecisms.' Hale C.B. held that 'although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published, which contains more malice than if they had but been once spoken, they are actionable.' No attempt was made to cite any case earlier than this, but counsel claimed to have 'a chain of cases from Hale C.B. in 1670 to the time of Wilmott C.J. within living memory,' and Chief Justice Mansfield had reluctantly to admit that 'the distinction has been made between written and spoken slander as far back as Charles the Second's time,' but he concluded, 'if the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal, which could not be maintained for the words if they had been spoken.'

But although the reports quoted do not go further back than the time of Charles II, the real origin of the English procedure against libels is to be found in the Star Chamber, abolished in the preceding reign. In Mr. Hudson's Treatise of the Court of Star Chamber, compiled apparently towards the end of the reign of James I, or early in that of Charles I, chapter xi is headed 'Of Libelling.' It would seem that this Court practically took over all cases of alleged

[1] Hardr. 470 (1670).

defamation, especially of pamphlets claiming to discuss public affairs in Church and State, and, finding the common law not sufficiently rigorous, boldly interpolated all that was lacking from the civil law. They adopted, however, not the comparatively mild Roman law of *injuria*, but the special provisions applicable to the *libellus famosus*; indeed the first case of this kind of which there is any full report[1] is headed *De Libellis Famosis*, and its whole terminology is borrowed from the Roman law. 'In all ages,' says Mr. Hudson, who may be accepted as an authority[2], 'libels have been severely punished in this Court, but most especially they began to be frequent about 42 & 43 Eliz., when Sir Edward Coke was her Attorney General,' and later on Coke is referred to as 'one who, I think, in his time was as well exercised in that case as all the Attornies that ever were before him.' The Court flung its net very wide. To 'scoff at' a person in rhyme or prose, and 'to publish disgraceful or false speeches against any eminent man or public officer,' or 'to hear it (the libel) sung or read and to laugh at it and to make merriment with it'—each and all of these might bring Her Majesty's subjects to the pillory. Two curious instances are given of 'gross errors' that have 'crept into the world': (1) 'that it is no libel if the party put his hand unto it,' and (2) 'that it is not a libel if it be true.' But both of these, he adds, 'have been long since expelled out of this Court.' The first of these points was probably raised as a protest against the Court's applying the old Roman law, directed only against anonymous pasquinades to the judgment of signed pamphlets. With regard to truth as a justification, it is explained that while as for spoken words, even 'although they be against a great person,' they may be justified, 'but if he put the scandal in writing, it is then past any justification.'

Such, described by a sympathetic observer, was the law of 'scandal' as administered in the Court of Star Chamber in the days of the early Stuarts, and although the Court was abolished by the Long Parliament the judges and the law remained largely the same. We see them in James the First's time building up the principle that once a 'scandal' true or false appeared in writing or in print it was 'past any justification,' and we can easily imagine

[1] 5 Co. Rep., 3 Jac. I (1609).

[2] The manuscript (Harl. MSS. No. 1226) has the following endorsement:—

'This treatise was compiled by William Hudson of Gray's Inn Esq. one very much practiced and of great experience in the Star Chamber and my very affectionate friend. His son and heir Mr. Christopher Hudson (whose handwriting this book is) after his father's death gave it to me 19 Dec., 1635.

Jo. Finch
Ch. Just. C. P. 11 Car. I,
Ld. Keep. Gr. Seal 15 Car. I.'

how such judges would regard the constantly relaxing power of the Censorship, which was then falling away to its final extinction in 1689. Shortly before this event, the judges 'met at the king's command,' as Chief Justice Scroggs tells us in *R.* v. *Harris* (7 State Trials, 929) and solemnly decided that 'all writers of news, though not scandalous, yet if they are writers of false news (as there are few others) are indictable and punishable,' and later in the same volume, in *R.* v. *Carr*, the Chief Justice declares 'that to print or publish any newsbooks or pamphlets of news whatsoever is illegal, that it is a manifest intent to a breach of the peace.' It is true that Lord Camden long after declared in *Entick* v. *Carington* (19 State Trials 1070) that this resolution of the judges was 'extrajudicial and invalid,' but it is a valuable fingerpost showing how the king and the judges, when they felt the Censorship slipping through their fingers, sought successfully to replace it by an equally efficient weapon. It is to this precise juncture in my opinion that we must look for the creation of that doctrine, first enunciated in our regular courts by Sir Matthew Hale, that although words 'spoken once' would not be actionable, 'yet they being writ and published' become actionable. The adaptation by the Star Chamber of the later Roman law of *libellus famosus* thus becomes part and parcel of the English common law, the England of the Restoration breaking away from the more logical and milder systems of the European jurists.

Another probable legacy from the Court of Star Chamber was that henceforth every libel became subject to indictment as a crime, to which indictment a plea of truth was no defence. The Star Chamber being, as it was well called, a 'Court of Criminal Equity,' and having drawn to itself the hearing of all cases of libel, the idea that libel was in its essence a matter for the Criminal Courts would naturally follow. It would seem then, oddly enough, that our too early abolition of the Censorship worked in this respect permanent ill, for it simply drove the Court and the judges to drop the old English law applicable to both written and parol scandal, and to create a new offence; to furbish up a weapon rescued from the armoury of the Court of Star Chamber as the only one sharp and swift enough to deal with the growing power of the printing press. And so a distinction of which Chief Justice Mansfield could find no trace in our ancient law became stereotyped in the English 'Law of Libel.'

JOSEPH R. FISHER.

SOME RECENT DECISIONS CONCERNING 'ATTEMPT' AND 'INTENT.'

THERE is an excellent story told of a member of a learned Society, presided over by an eminent person of not wholly unexceptionable manners, who, when a fellow member began an address at one of its meetings with the customary 'Mr. Chairman and Gentlemen,' remarked, *sotto voce*, but nevertheless audibly, 'And a very proper distinction!' The English law draws an equally proper distinction between 'attempt' and 'intent'; and in these days, when the maxim *Voluntas reputabitur pro facto*—like certain other legal maxims which shall be nameless—if it ever had any real vitality, is well-nigh obsolete, if not as dead as Queen Anne, there is small reason for lawyers to confuse these terms, or to regard them as in any sense synonymous. But we are far from being sure that that august, albeit miscellaneous, tribunal known as C. C. R. has not, in its collective wisdom, succeeded, not only in confusing the terms, but—by a rather peculiar series of recently decided cases—in making confusion worse confounded, through a curious inconsistency of decision.

The question arises in connexion with so-called 'attempts' to commit impossible crimes. The subject appears to have been for the first time fully discussed by the Court for Crown Cases Reserved in *Reg.* v. *M'Pherson* (1857), 1 D. & B. 199. The prisoner in that case was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment which goods in fact were not in the house at the time, though there were other goods there. The prisoner was convicted of breaking and entering and *attempting* to steal. A case was reserved, and argued before a strong Court, consisting of Cockburn C. J., Coleridge, Crowder and Willes JJ., and Bramwell B., who quashed the conviction on the ground that there was no 'attempt' to commit the felony charged. In the course of the argument for the Crown (no counsel appeared for the prisoner) both Coleridge J. and Cockburn C. J. protested against the confusion of *attempt* with *intent*, pointing out that though the prisoner when he broke into the house had the *intention* to steal the goods specified in the indictment, they not being there he could not *attempt* to steal them. Cockburn C.J. put the case shortly thus: 'There can be no attempt *asportare* unless there is something *asportare*. There is a difference between

intending to do a thing and attempting to do it. A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. *How can he be said to have attempted to commit the murder? He merely attempts to carry an intention into effect.*' Bramwell B., to the like effect, after referring to the hypothetical case suggested in argument, that a man putting his hand into an empty pocket might be convicted of attempting to steal, as plausible at first sight, disposed of it effectually by asking whether a man, who, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could be convicted of attempting to murder the man he took it to be. Separate judgments were delivered all proceeding on the same lines, Cockburn C.J. laying it down that: 'The word "attempt" clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded.'

Seven years later the hypothetical case of an attempt to pick an empty pocket, which had been suggested during the argument of *Reg.* v. *M'Pherson*, actually arose, and came in a concrete form before the Court for Crown Cases Reserved in *Reg.* v. *Collins* (1864) (L. & C. 471; 9 Cox C. C. 497; 33 L. J. (M. C.) 177; 10 L. T., N.S. 581), when Baron Bramwell's *obiter dictum in arguendo* in the former case received confirmation by the formal decision of an equally strong Court, consisting of Cockburn C.J., Williams J., Martin B., Crompton J., and Bramwell B. Mr. Poland for the defence picturesquely, but none the less accurately, described the prisoner's putting his hand into the empty pocket as 'a mere voyage of discovery.' The prisoner, as the Court pointed out, had a double purpose, first to ascertain whether there was anything in the pocket; secondly, to take it if there was. He tried to steal something, but was foiled because there was nothing. Counsel for the Crown sought to distinguish the block of wood illustration, on the ground that to shoot at a log by mistake for a man was not an analogous case; for shooting at a log is not an overt act towards shooting a man; and he contended that the case in question was more like shooting at a man in chain armour. But Cockburn C.J. promptly disposed of this contention by pointing out that the case would have resembled shooting at a man in chain armour, if there had been a purse in the pocket, but tied or otherwise fastened there. As illustrative of the principle that 'intent' without 'attempt' is *nihil ad rem*, the Court suggested various hypothetical

cases; as a man walking into an open house with intent to steal and finding the house empty; or a man going with a pistol with intent to rob and murder another in a lane, to which the intended victim did not come; or a man taking an umbrella from a stand with intent to steal it, and afterwards finding that the umbrella was his own; in none of which cases a conviction could be obtained. The Court held the case to be governed by *Reg.* v. *M'Pherson*, and accordingly quashed the conviction.

The criminal law of attempt as thus laid down in (1857) *Reg.* v. *M'Pherson* and in (1864) *Reg.* v. *Collins* was recognized as settled law in 1879 by all the members of the Criminal Code Bill Commission of that year, consisting of Lord Blackburn, Mr. Justice Barry, Mr. Justice Lush, and Mr. Justice Stephen. The Commissioners in their Report upon the Draft Code [1] in proposing to alter the law said:—'Section 74, in this part, deals with attempts to commit offences, and treats the act of a person who, with the intention to carry off the money he believes to be there, puts his hand into a pocket, or breaks open a box, as an attempt to steal, though there was in fact no money in the pocket or box. This alters the law from what it has been held to be.' Accordingly, section 74 of the Code after defining an 'attempt' to commit a crime, in terms which substantially follow the language of the judgments in the cases above referred to, introduces the following clause (to which a note is appended, saying, 'This declares the law differently from *Reg.* v. *Collins*, L. & C. 471'):—

'Everyone, who, believing that a certain state of facts exists, does or omits an act the doing or omission of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible [2].'

[1] Report of the Criminal Code Bill Commission 1879, C. 2345, at pp. 19, 77.

[2] Section 74 further provided that: 'The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.' The exact point at which preliminary steps towards crime become criminal cannot, as Mr. Justice Stephen has pointed out, in the nature of things be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is, as he remarks, more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of an unlawful object. (General View of the Criminal Law of England, 2nd ed. (1890), p. 83.)

But it may be doubted whether the learned author be correct when he goes on to say (p. 84) that 'the bare formation of a criminal intention is not in itself criminal, *but this is the last step towards crime of which this can be affirmed.*' For in the illustration above quoted, the buying of the pistol and the going to the lane and the lying in wait for the victim would all be steps towards crime; but, it is conceived, not in themselves criminal, though they would come later than the formation of the criminal intention to kill, formed before the offender entered the shop to buy the pistol.

Neither the Draft Criminal Code of 1879 nor the more recent efforts at criminal law legislation have yet become law; and the new legislation, which the Draft Code of 1879 proposed for the alteration of the law as settled by *Reg.* v. *Collins*, has not been effected. The law therefore remained as laid down in that case; and Mr. Justice Stephen, accordingly in his History of the Criminal Law of England[1] published in 1883, namely twenty years later than that decision, thus expounds it:—

'The most curious point on this subject (i.e. attempts) is the question whether, if a man attempts to commit a crime in a manner in which success is physically impossible, as for instance if he shoots at a figure which he falsely supposes to be a man with intent to murder a man, or puts into a cup pounded sugar which he believes to be arsenic, or attempts to pick an empty pocket, he has committed an attempt to murder or to steal. By the existing law (*Collins's Case*, L. & C. 471) he has committed no offence at all, and this is also the law of France, and I believe of other countries[2], the theory being that in such cases the act done merely displays a criminal intention, but cannot be regarded as an attempt because the thing actually done was in no way connected with the purpose intended to be effected. It was proposed by the Criminal Code Commission to reverse this, I think with unnecessary severity. The moral guilt is no doubt as great in the one case as in the other, but there is no danger to the public, and it seems harsh to treat as an attempt one only of many acts by which a criminal intention is displayed; but the question is one of little practical importance.'

But the question has now, in consequence of certain recent decisions, unsettling well settled law, become one of considerable practical importance and interest. For six years after the learned author just quoted had thus expounded the existing law no wind of new doctrine arose to ruffle the smooth current of judicial decision. The first troubling of the waters took place when (1889) *Reg.* v. *Brown* (24 Q.B.D. 357; 59 L.J.M.C. 47; 61 L.T. 594; 38 W.R. 95) came before the Court for Crown Cases Reserved,

[1] Vol. ii. 225, and note (1). See also Stephen's Digest of the Criminal Law (Crimes and Punishments), 3rd ed. (1883), p. 37, Art. 49 (Illustration 9), 'An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that crime.'

[2] It is not a little singular that the learned author, who has a special acquaintance with our Indian legal system, should not have referred to the exception afforded by the provisions of the Indian Penal Code (XLV of 1860), chap. xxiii, sect. 511; which enacts that 'whoever attempts to commit an offence punishable by this Code . . . *and in such attempt does any act towards the commission of the offence* shall be punished' as therein provided. The legislative illustration, appended to section 511, is neither more nor less than the facts in *Reg.* v. *Collins*, but with a different result. '*A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt, in consequence of *Z*'s having nothing in his pocket. *A is guilty under this Section.*'

consisting of Coleridge C.J., Pollock B., Field, Manisty, Cave, Day, and Grantham JJ. The question was as to the validity of the conviction of the prisoner, a boy, for an attempt to commit an offence upon a fowl. The case was stated in consequence of a doubt which had arisen (owing to a supposed decision in an unreported case) whether a fowl was an 'animal' within the meaning of 24 & 25 Vict. c. 100, s. 61. The Court held that a fowl was within the statute; and, *it being found as a fact in the case that the offence in question could have been committed*, the conviction was accordingly affirmed. Having regard to this finding of fact any further deliverance by the Court with reference to the law as decided in *Reg.* v. *Collins* was clearly unnecessary and irrelevant. Nevertheless Coleridge C.J., by whom the case was stated, and who delivered the judgment of the Court, the rest of the Court merely concurring, proceeded to discuss and to over-rule *Reg.* v. *Collins*; notwithstanding that there had been no argument, no counsel appearing either for the Crown or for the prisoner. His Lordship, not forgetful of this fact, began by saying: 'It is no doubt a disadvantage that this case should not have been argued before us, but we have fully discussed the question ourselves.' Then, referring to *Reg.* v. *Collins*, he said: 'Now that is a decision with which we are not satisfied. It was in our opinion decided upon a mistaken view of the law[1].' That this utterance was mere *obiter dictum* is indeed practically admitted in the following sentence, in the same part of the judgment: 'We do not think, however, that upon the facts, this case comes within *Reg.* v. *Collins*, for there seems no doubt that this boy could have completed the offence.'

Having regard to the language of the judgment just quoted it is not a little surprising to find the Lord Chief Justice in delivering the judgment of the Court for Crown Cases Reserved, (Hawkins, Wills, Lawrance, and Wright JJ., concurring,) a year or two afterwards in *Reg.* v. *Duckworth* ('92, 2 Q. B. 83), saying, in commenting

[1] So reported in 59 L. J. (M. C.) 48, where the headnote refers to *Reg.* v. *Collins* as 'dissented from.' The report of the same case in 24 Q. B. D. 357 is to the same effect:—'That is a decision with which we are not satisfied . . . That case in our opinion is no longer law:' and the headnote treats the case as 'over-ruled.' So also does the headnote in 38 W. R. 96 where, in the report of the judgment, we have 'We do not think the decision in *Reg.* v. *Collins* should any longer be considered binding.' The report of the case in 61 L. T. 594, however, contains expressions differing *toto cœlo* from these. The headnote refers to *Reg.* v. *Collins* as 'distinguished'; while in the judgment, as here reported, we read, 'Now that is a decision with which we all agree;' but, further on, the unreported case above referred to is mentioned as having 'proceeded on the authority of *Reg.* v. *Collins*, and so far as it proceeded on that authority, it was in our opinion decided upon a mistaken view of the law.' A legal contemporary commenting on these conflicting reports of *Reg.* v. *Brown* soon after their publication, afforded the following significant information respecting that decision: 'In point of fact, we believe the judgment was somewhat informal, and it was not very easy to catch what actually was said' (34 Sol. Jour. 653).

on a case which had been cited in argument—'There was, therefore, a serious question whether a man could attempt to discharge a firearm which in fact could not possibly be discharged (it being a blunderbuss discharged by means of a flint, and there being no flint in it). I do not say how that question would be decided at the present day; but at all events there is something to be said upon the point.' The sentence last quoted, to say the least, leaves the correctness of the decision in *Reg.* v. *Collins* an open question, and is wholly inconsistent with the judgment delivered by his lordship in *Reg.* v. *Brown*, purporting, as we have seen, to over-rule that decision [1].

Curiously enough the judgment just quoted had barely been delivered when the same judges sitting in the same Court for Crown Cases Reserved were called upon to consider a case in the same morning's cause list, stated by the Deputy Chairman of Clerkenwell Quarter Sessions, for the express purpose of terminating the doubts which, not unnaturally, had arisen as to whether *Reg.* v. *Collins* had been over-ruled by *Reg.* v. *Brown*. The case so stated was *Reg.* v. *Ring* [2] (1892) (61 L. J. (M. C.) 116; 66 L. T. (N. S.) 300; 8 Times Reps. 326; 56 J. P. 552) in which the facts were on all fours with those in *Reg.* v. *Collins*. The prisoners had been convicted of an attempt to steal. The evidence proved that they had tried to pick the pockets of several female passengers at a railway station. There was no evidence that there was anything in the pockets of the unknown females, no one having been in communication with them. Counsel appeared for the Crown, but none for the prisoners, and the point of law does not seem to have been argued at all. Lord Coleridge C.J. again delivered the judgment of the entire Court, which as reported was brevity itself, being merely declaratory of the law, no arguments being referred to, or reasons for the judgment given. The following is the full judgment, as obtained from a collation of the various reports:—'This conviction must be affirmed. The case was stated by the learned Deputy Chairman to ascertain whether *Reg.* v. *Collins* is still law. That case is no longer law. It was over-ruled by *Reg.* v. *Brown*, which

[1] Can it be that the learned judge had forgotten his decision in (1889) *Reg.* v. *Brown* (24 Q. B. D. 357)? That case was not cited by counsel for the Crown in *Reg.* v. *Duckworth*, in which, as commonly occurs in C. C. R. cases, no counsel appeared for the prisoner. A case of the same name (1883) *Reg.* v. *Brown* (10 Q. B. D. 381) was cited, but the synonymity is a mere coincidence, the two cases being in no way connected.

[2] Both cases, *Reg.* v. *Duckworth* and *Reg.* v. *Ring*, were heard and decided on Feb. 13, 1892. The cause list for that date contained some civil causes, and then three cases for the consideration of the C. C. R., of which the above were two, being separated by the third case. The three cases were heard and disposed of in the same order, *Reg.* v. *Ring* being last in the list on that day, which was a Saturday. The sitting of the Court therefore was not a long one, and the above two cases appear to have been disposed of, to say the least, somewhat rapidly.

was decided by five judges[1], and since this case will also be decided by five judges—of whom four are different judges—the learned judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg.* v. *Collins* is bad law; and I hope that will be sufficient.' It must be confessed that both the manner and the matter of this deliverance leave much to be desired. As for the manner of it, the Lord Chief Justice, having regard to the terms of his reference, not only to the Court below in the case before him, but to the Court responsible for the decision in *Reg.* v. *Collins*, seems for the nonce to have forgotten Bacon's dignified observation concerning inconsistency of judgments; that, if it be that previous decisions must be set aside, they are at least entitled to honourable burial[2]. The matter of the judgment is equally unsatisfactory. It contains no legal reasoning; the argument is purely arithmetical, viz. 'nine[3] judges to five,' and conducted on the *numerantur non ponderantur* method. Even then the Lord Chief Justice's figures are not correct; for he overlooked the fact that to the five judges who decided *Reg.* v. *Collins* must be added the five judges who decided *Reg.* v. *M'Pherson* (three of whom were different judges), which case was after full argument deliberately followed in *Reg.* v. *Collins*. So that if any weight is to be attached to the mere counting of judicial heads, the correct result is that eleven[4] judges have in a somewhat heroic, not to say high-handed, and so to speak obiter-dictatorial, fashion over-ruled the deliberate judgments of eight judges of co-ordinate jurisdiction, on a point of law settled more than thirty-five years ago, and, during that period, not only respected, but regarded as a catena of authority uniformly acted upon in scores of criminal cases.

Moreover, it must be borne in mind, that the five judges who decided *Reg.* v. *Collins* did so after hearing full argument, both for the Crown and for the prisoner; whereas the seven judges, who we are now led to understand over-ruled them in *Reg.* v. *Brown*, did so in an *obiter dictum* judgment, in the absence of counsel, and consequently without hearing any argument at all, either for the Crown or the prisoner, and apparently without due examination of the authorities. Further, the Horatian line applies:—

> 'Vixere fortes ante Agamemnona
> Multi;'

which is, being translated, there were not a few 'strong' judges

[1] There is something wrong here. *This* (1889) *Reg.* v. *Brown* (24 Q. B. D. 357) was decided by seven judges. Is it possible that the learned Lord Chief Justice was looking at the report of *another* (1883) *Reg.* v. *Brown* (10 Q. B. D. 381) (as to which see above, p. 169, note 1) which was decided by five judges?

[2] 'Judicia enim reddita, si forte rescindi necesse est, saltem sepeliuntor cum honore.' Bacon, De Augm. Lib. viii. Aph. 95.

[3] Should be eleven, see below, and note 1 *supra*.

[4] See notes 1 and 3 *supra*.

before the present day. It may be doubted whether the profession generally will, in the circumstances above mentioned, regard with equanimity the unsettling of law as laid down by Cockburn C.J., Bramwell and Martin BB., Coleridge, Crowder, Willes, Williams and Crompton JJ. in *Reg.* v. *M'Pherson* and *Reg.* v. *Collins*, judicial judgments arrived at after full consideration, and which received the support of Lord Blackburn and Barry, Lush and Stephen JJ. as members of the Criminal Code Bill Commission, i. e. eleven judges in all, by the over-ruling judgments of another eleven in *Reg.* v. *Brown* and *Reg.* v. *Ring*, viz. Coleridge C.J., Pollock B., Field, Manisty, Cave, Day, Grantham, Hawkins, Wills, Lawrance and Wright JJ. The question of law is one which, notwithstanding what was said in *Reg.* v. *Ring*, ought to be still considered as, to say the least, open; and it is eminently a suitable subject for argument before the full Bench of Judges in order that it may receive that final consideration which it deserves.

The importance of the legal question involved in the case above referred to, and the necessity for its re-discussion *ab initio* with a view to its final and authoritative determination, has, still more recently, been made apparent by certain judicial utterances in two or three cases, in which, it is submitted, the same principle, though not precisely the same point, was involved.

Less than six months after the decision in *Reg.* v. *Ring* the case of *Reg.* v. *Waite* ('92, 2 Q.B. 600), stated by Wright J. for the opinion of the Court for Crown Cases Reserved, came before Coleridge C.J., A. L. Smith L.J., Pollock B., and Cave and Bruce JJ. It is unnecessary for the present purpose to refer to the point actually decided. It is sufficient to say that Coleridge C.J., after referring to the extent of the applicability of the rule at common law, as laid down by Lord Hale, that there is a *praesumptio iuris et de iure* that a boy under fourteen is under a physical incapacity to commit certain sexual offences, said:—'The question whether he (the prisoner, a boy under fourteen) could be convicted of the attempt does not arise, but it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing; that question however can be dealt with when it arises [1].'

A few months later the same question arose in another similar case, also stated by Wright J. for the opinion of the Court for Crown Cases Reserved, *Reg.* v. *Williams* ('93, 1 Q. B. 320). Wright J. at Assizes had directed the jury that the prisoner (a boy under fourteen)

[1] A. L. Smith L.J. expressed no opinion on this head, observing that the question of attempt did not arise in the case; the conviction having been for the full offence. The rest of the Court concurred.

could not be convicted of the felony charged, nor of any attempt to commit such felony. No counsel appeared for the Crown or for the defendant in the Court for Crown Cases Reserved, consisting of Coleridge C.J., Hawkins, Cave, Day, and Collins JJ. Lord Coleridge in giving judgment again expressed his opinion that the defendant 'could not be convicted of attempting to do that which the law says he was physically incapable of doing.' Hawkins J. in his judgment on the other hand said, 'I do not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do.' Cave J. on this point said he desired a further discussion of the question before deciding it; but at present he was inclined to concur in the opinion expressed by Hawkins J., in which Day and Collins JJ. also concurred. Comparing the two cases last referred to with those previously dealt with, an inconsistency of decision seems apparent. It is not a little surprising to find two judges, Coleridge C.J. and Wright J., who in 1892 held that in law a person *can* 'attempt' to steal from an empty pocket, holding in 1893 that in law a person *cannot* 'attempt' to commit an offence which he is physically incapable of committing. Hawkins J., on the other hand, consistently with his concurrence in the decision of the Court in the pocket-picking case, expressed his opinion that in the later case the boy could have been convicted. And it is indeed difficult to see upon what principle any distinction can be drawn between the two classes of cases so far as the law of 'attempt' is concerned. In both the crime intended to be committed is impossible of completion; in the one case because, the pocket being empty, there is no material upon which the offender can operate; and in the other case, because there is in fact, or by a legal fiction, the effect of which is equivalent to a fact[1], so to speak, no instrument, which the offender can employ to carry out his criminal intention. The idea that there can be an attempt, notwithstanding the absence of material to be operated upon, but that there cannot be an attempt because of the absence of an instrument or operating agency, is worthy of *Tristram Shandy*; as Lord Justice Bowen once remarked, anent a suggestion of counsel that in the interval between decree *nisi* and absolute the parties to a divorce suit were in such a peculiar relation that intercourse between them might constitute adultery[2]. So far as the actual possibility of committing the intended crime is concerned the *impotentia* exists in both the above classes of cases,

[1] The presumption of *impotentia* under the age of 14, being a *praesumptio iuris et de iure*, is irrebuttable; and therefore, as Coleridge C.J. pointed out in *Reg.* v. *Waite* ('92, 2 Q. B. 600), judges have time after time refused to receive evidence to prove that a particular prisoner was in fact capable of committing the offence.

[2] *Stankope* v. *Stankope*, (1886) 11 P. D. at p. 104.

though in a different way. *Lex non cogit ad impossibilia* is a maxim which might well be supplemented by a new maxim, *Lex non id crimen vocat quod est impossibile;* unless indeed that other maxim, *Voluntas reputabitur pro facto*, must be deemed to have been revived by certain of the decisions above criticized. It is however difficult to believe that the law of 'attempt,' applicable in such cases as are above dealt with, is, or—after due examination of the authorities of a more thorough kind than seems as yet to have been made by any of the judicial tribunals before which the question has hitherto directly or indirectly come for consideration—would be held to be different, according as the *impotentia* is, so to speak, inherent in the subject-matter, or is inherent in the agent by means of which subject-matter is sought to be operated upon. Some points involved in the discussion of the question under consideration suggest legal quillets, and exercises in scholastic logic, of a kind in which Aquinas and his brother schoolmen, writers of patristic and mediaeval divinity, would have fairly revelled. Certain other kindred topics of argument, and analogies, which occur to us, suggested by the judgments in *Reg.* v. *Waite* and *Reg.* v. *Williams*, however fitting they might have been for detailed disquisition in such a work as Sanchez's *De Matrimonio*, are wholly unsuitable for discussion in the pages of this REVIEW.

Apart from the practical question what the law of 'attempt' in such cases as those we have been discussing is, there is the further practical and important question, what the law should be. Whatever the existing law may be finally held to be; in popular parlance, and in public opinion, as distinct from legal definition, a man who, with felonious intent, thrusts his hand into an empty pocket, which he believes to be full of gold, but in fact finds empty, is as guilty of an attempt to steal as though the pocket had been in fact to his knowledge full of gold. The moral guilt of the offender is the same in both cases, but as the danger to the public is not equally great there is room for considerable divergence of opinion as to whether the criminal law should punish both cases alike as an attempt. Thus, although, as we have seen, Mr. Justice Stephen acquiesced in the proposal of the Criminal Code Commission of 1879, of which he was a member, to alter the law as laid down in *Reg.* v. *Collins* so as to make the fruitless endeavour to pick an empty pocket an 'attempt' to steal; he, personally, as appears from, and for the reasons given in, the passage in his History of the Criminal Law of England above quoted[1] is of opinion that the alteration of the law proposed by the Draft Code of 1879 (an alteration, if the latest decisions in *Reg.* v. *Brown* and

[1] Page 167.

Reg. v. *Ring* are to stand, now practically effected by judicial decision) is harsh. The opinion of the learned author on such a point is especially worthy of consideration; for, to adopt the language of well merited compliment paid to him by the present Lord Chief Justice, 'he knows these things, as we all know, with great particularity, and has gone into them, more than any other member of the Bench[1].' In support of the view taken by Mr. Justice Stephen, opposing any alteration in the law, it may be remembered that even if such offences as we have been considering are not punishable at law as 'attempts,' the offenders need not be allowed to go scot free. Thus, in the pocket-picking cases, there seems to be no reason to doubt that the prisoners, if they had been charged with committing an assault with intent to commit a felony, could have been convicted of a misdemeanour, with the liability to a maximum punishment of two years' imprisonment with hard labour[2]. Again, in the class of cases represented by *Reg.* v. *Williams*[3], even though the offender cannot be convicted either of the felony charged, or of an attempt to commit such felony, he can be, as in that case, found guilty of the misdemeanour of indecent assault, with the same maximum punishment as that just mentioned. Such punishments appear sufficiently adequate, so far as their deterrent influence is concerned.

One word in conclusion on another practical matter. The decisions in some of the above cases, to which it is one of the objects of this article to call the attention of those whom it may concern, afford a striking commentary on the conditions under which much of the work of the Court for the Consideration of Crown Cases Reserved is done. Celerity in the determination of causes is no doubt a blessing. It is, moreover, facilitated by the simple plan of hearing no argument at all, or argument upon one side only. But accuracy is an even better boon than rapidity of decision. In only one of the eight cases dealt with in this article counsel appeared both for the Crown and for the defendant before the Court for Crown Cases Reserved; in five of the cases counsel appeared to argue for the Crown alone; in the remaining two cases—in one of which, as we have seen, well settled law was deliberately set aside by the judgment of the Court—no counsel appeared at all. 'God forbid,' exclaimed Chief Justice Abbott, 'that it should be imagined that an attorney or a counsel, or even a judge is bound to know all the law[4]!' And it is not surprising that even a number of judges should, on occasion, fall into grave error, if they essay to

[1] *Reg.* v. *Brown* (1883) 10 Q. B. D. at p. 384.
[2] See Stephen, A Digest of the Criminal Law (Crimes and Punishments), 3rd ed. p. 38, n. 8.
[3] *Supra*, p. 171.
[4] *Montriou* v. *Jefferys*, (1825) 2 C. & P. 116.

decide off-hand difficult legal questions, without more examination and research than the Court can give while sitting, and without having the advantage of the assistance of counsel, to present arguments based upon an adequate investigation of authorities conducted before coming into Court. We take leave to doubt whether the decisions of the Court for Crown Cases Reserved, in the cases adversely commented upon above, would have been arrived at, if counsel had been, before the hearing, assigned to the prisoners, and both sides of the argument had been threshed out. To assign, as is often done, counsel to a prisoner on his trial at the Assizes where the facts are elicited, but not to do so, when the case in which those facts are stated comes before the Court for Crown Cases Reserved, for the opinion of the Court on a question or questions of law of general interest and importance, shows, it is submitted, a regrettable omission, and a curious inconsistency of procedure, which occasionally results in a not less curious inconsistency of judicial decision.

SHOWELL ROGERS.

[This article, in which Sir James Stephen's works are frequently cited, was written and revised before his lamented death. Mr. Rogers now desires to signify his concurrence in the general feeling of respect and admiration which has been shown both within the legal profession and outside it. What I could myself say of Sir James Stephen for the moment I have said elsewhere. Here it may be fitting to remember that he was one of the first contributors to this REVIEW.—F. P.]

FOREIGN COMPANIES IN ITALY.

THE Italian law of Companies being of comparatively recent date, a few notes as to its provisions with regard to foreign companies established in Italy may possibly not be without interest.

The Code of Commerce of 1882 deals with foreign companies in its section viii, book i, ch. ix, arts. 230, 231, 232, and divides them into two very distinct and separate categories:—

1. Foreign companies establishing in Italy 'a secondary seat or representation' (una sede secondaria od una rappresentanza).

2. Foreign companies having in Italy their 'seat and the principal object of their undertaking' (la loro sede e l' oggetto principale della loro impresa).

As these two classes are very differently treated, it may be as well to consider first the criterium by which they are to be distinguished.

This is a matter by no means easy of decision. The law has not laid down any express rules with respect to it, and has refrained from attempting any definition of the words 'oggetto principale,' which, as may be imagined, have given rise to a considerable number of decisions. The only safe conclusion to be drawn from them appears to be that every case will be decided upon its own merits, and from a practical and common-sense point of view of the question, 'is the principal object of the company in question *really* in Italy.' Nevertheless if it can be shown that the company *may* have important objects in other countries, even though no evidence can be given of its operations in such countries at the moment, the Italian Courts are chary of deciding that the '*principal*' object is in Italy. It is accordingly the practice to insert in the memorandum of association of such companies incorporated here as intend to establish themselves or to conduct operations in Italy, a provision that the objects of the company are to do certain things in Italy *and in other countries*, or words to a similar effect, and to adopt a name which is not of too exclusively Italian a character.

It must not be overlooked, moreover, that the law requires the two elements—viz. that the seat of the company *and* the principal object thereof should both be in Italy—to bring the company within this second category, and it has been held that the 'seat' required must be the principal seat of operations and not a mere branch of less importance than the office situate in the country of origin.

Let us now consider the respective situations of these two classes of companies:—

I. *Companies establishing a branch* (sede secondaria) *or representation in Italy.*

The situation of such companies is governed by art. 230, sections (1), (2), of the Code of Commerce, which are as follows [1]:—

'230. Companies legally constituted abroad which establish in the kingdom a branch or representation are subject to the dispositions of the present code concerning the deposit, the registration, the placarding and publication of the memorandum, articles, and other instruments modifying the one or the other, and of the balance-sheets; they shall moreover publish the names of the persons directing or administering such branches, or who otherwise represent the company in the kingdom.

'These persons are responsible towards third parties in the same manner and to the same extent as the directors of Italian companies.'

This latter provision is of considerable importance, inasmuch as it establishes that even though the company be a foreign one and governed, as to its corporate status, by the law of its domicile, yet the directors of such a company are responsible to the public and the shareholders in Italy in the same manner as the directors of an ordinary Italian company. This responsibility is defined by art. 147 [2], which is as follows:—

'The directors are jointly and severally responsible towards the shareholders and towards third parties:—

'1. For the reality of the payments made by the shareholders.

'2. For the actual existence of the dividends distributed.

'3. For the existence of the books required by law and for their being regularly kept.

'4. For the exact fulfilment of the deliberations of general meetings.

[1] '230. Le società legalmente costituite in paese estero, le quali stabiliscono nel Regno una sede secondaria od una rappresentanza, sono soggette alle disposizioni del presente codice riguardanti il deposito e la transcrizione, l' affissione et la publicazione dell' atto costitutivo, dello statuto, degli atti che recano cambiamenti all' uno od' all' altro, e dei bilanci; devono publicare inoltre il nome delle persone che dirigano o amministrano tali sedi, od altrimenti rappresentano la società nello stato.

'Queste persone hanno verso i terzi la responsabilità stabilita per gli amministratori delle società nazionali.'

[2] '147. Gli amministratori sono solidariamente responsabili verso i socii e verso i terzi:

'1°. della verità dei versamenti fatti dai socii;

'2°. della reale esistenza dei dividendi pagati;

'3°. dell' esistenza dei libri voluti dalla legge e della loro regolare tenuta;

'4°. dell' esatto adempimento delle deliberazioni delle assemblee generali;

'5°. e in generale dell' esatta osservanza dei doveri ad essi imposti dalla legge, dall' atto costitutivo, e dallo statuto e che non siano proprii esclusivamente di un ufficio determinato e personale.'

These provisions are similar to those contained in the codes of Belgium and Brazil.

'5. Generally for the exact observation of the duties imposed upon them by law, and by the memorandum and articles, and which are not exclusively proper to any particular or personal office.'

The above formalities of registration of the memorandum and articles, &c., required alike for Italian and for foreign companies in Italy (arts. 90, 91, 92, 93, 94, 95, and 98), are the only ones necessary in the case of a foreign company of the first category. The form of such memorandum, &c., does not concern Italian law, in accordance with the generally recognized principle 'locus regit actum,' nor their contents (save in so far as they may infringe any rule of public policy or the law as to immoveables) in conformity with the general principles expressed in article 6 of the preliminary chapter of the Civil Code [1], which is as follows:—'The status and capacity of persons and family relations are governed by the laws of the nation to which they belong;' and in art. 3 [2] of the same Code, 'Foreigners are admitted to the enjoyment of the civil rights conferred on Italian citizens.' With respect to the latter article it was, however, for some time doubtful whether it applied to foreigners who had only a corporate existence as companies. But this doubt was set at rest by a decision in the affirmative of the Supreme Court of Turin of Nov. 18, 1882 [3].

Let us now consider the situation of the second class of companies.

II. *Companies having in Italy their seat and principal object.*

The situation of such companies is exceedingly simple. They are treated in all respects as if they were Italian companies, incorporated under Italian law. Art. 230, section (3), is as follows [4]:—'Companies constituted abroad having in the kingdom their seat and principal object are considered as Italian companies, and are subject, even for the form and validity of their memorandum and articles, although drawn up abroad, to all the dispositions of the present code.' Inasmuch as some of 'the dispositions of the present code' are of a very stringent character, especially with regard to the profits of promoters [5], which the law has apparently endeavoured

[1] 'Art. 6. Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono.'

[2] 'Art. 3. Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini.'

[3] Cf. also 'Lo stato civile dei stranieri in Italia,' by Signor Pappafara, advocate at Zara, and an article on the same subject by M. Maurice Baudoin Bugnet, Juge suppléant du tribunal civil de Melun, in the 'Bulletin mensuel de la Société de législation comparée,' June—July, 1893.

[4] '230. . . . Le società costituite in paese estero, le quali hanno nel Regno la loro sede e l'oggetto principale della loro impresa, sono considerate come società nazionali e sono soggette anche per la forma e validità del loro atto costitutivo, benchè stipulato in paese estero, a tutte le disposizioni del presente codice.'

[5] Art. 127.

to make practically impossible, it may readily be conceived that foreign companies intending to operate in Italy are very much concerned to avoid being classed in the second category, and that considerable ingenuity is exercised in practice to avoid what is usually considered a most undesirable consummation. Moreover, the fact that half the capital of an Italian company has to be deposited at the Treasury, and only the moderate interest derivable from Government securities is available in respect of it, and that—in addition to a tax on immoveables of 33 per cent.[1] and a very heavy income-tax, which are of course applicable to foreign corporations in Italy as well as to Italian companies proper—there are several other taxes which are leviable upon the latter alone, it will at once be evident that it is as much to the interest of the Italian Government that all foreign companies in Italy should be considered as Italian under this article, as it must be that of such companies to escape the status in question. Indeed the company law of Italy, as a whole, appears to be of so Draconian a character, besides bringing into the coffers of the fisc under one guise or another so large a portion of the profits of companies incorporated under it, that one is inclined to wonder how Italian companies contrive to exist at all, with any satisfaction to their shareholders, and indeed it is believed that since 1882 the number of companies formed abroad for operation in Italy has enormously decreased.

Such are the principal features of the law of Italy with regard to foreign companies.

If we glance at the legislation of other European states on the same subject we find considerable similarity with the Italian law in some of them.

Portugal, in her Code of Commerce of 1888, has adopted the Italian system bodily, articles 110 and 111 being almost literal translations of art. 230 of the Italian Code. 'Art. 110. Companies formed abroad but intending to have in the kingdom a branch and to exercise there their principal industry will be considered for all intents and purposes as Portuguese companies, and will be subject to all the dispositions of the present code.'

'Art. 111. Companies legally constituted abroad which establish in the kingdom a branch or any other representation are subject to the dispositions of the present code concerning the registration and the publication of their memorandum and articles, and of the powers of their representatives, in the same manner as Portuguese companies

[1] The Hôtel du Quirinal in Rome, for instance, pays 50,000 lire (£2000) per annum in respect of this tax.

of the same kind, and with regard to bankruptcy are subject to the terms of art. 745, sect. 1.

'The representatives of the companies referred to in the present article assume the same responsibility towards third parties as the directors of Portuguese companies.'

In France foreign companies are governed by the law of May 30, 1857; and, as regards English companies, by the terms of the treaty between Great Britain and France of April 30, 1862, entered into in pursuance of the law of 1857. The system is so far similar to that in force in Italy that all companies whose 'principal establishment' is in France are considered as French companies, and are subject in all respects to French law, although they may have been incorporated abroad, under a foreign law, and although all their shareholders are foreigners [1].

In Belgium the system is practically identical with that of France; every foreign company whose principal establishment is in Belgium is subject to Belgian law, even though its memorandum and articles have been drawn up abroad in conformity with a foreign law (Law of the 18th of May, 1873, art. 129), and the memorandum and articles, balance-sheets, &c., of foreign companies establishing a branch or any kind of office in Belgium must be registered according to Belgian law (ibid., art. 130), and the directors of such companies incur the same responsibility as those of Belgian companies.

In Spain the Code of Commerce [2] requires that foreign companies operating in the Peninsular should conform to the law of their own country with respect to their capacity to contract, and with that of Spain as to all that concerns the 'creation of their establishments on Spanish territory, their commercial operations, and the jurisdiction of the Spanish tribunals.' Moreover, if they establish a branch in Spain they must register their articles, &c., in the same manner as in Italy.

In Germany foreign companies establishing a branch in the empire are similarly required to execute the formalities prescribed by the Code of Commerce.

So also in Mexico, where the recent Code of Commerce requires from foreign companies the publication of their annual balance-sheet and of the names of their directors [3].

[1] Aix 5 août 1868 (S. 1868, 2. 334). Cass. 29 avril et 28 octobre 1885 (R. S. 1885, p. 92), Seine 12 décembre 1885 (S. S. 1888, p. 104), Seine 17 janvier 1888 (S. S. 1888, p. 425).

Cf. also Lyon-Caen et Renault, 'Traité des Sociétés commerciales,' p. 823, and Houpin, 'Traité théorique et pratique des sociétés par actions françaises et étrangères,' T. i. p. 5.

[2] Articles 15 and 21, last paragraph.

[3] Articles 265–267.

It will thus be seen that the law of Italy with respect to foreign companies does not stand upon an absolutely unique basis.

But it is none the less questionable whether the general stagnation of business in that country at the present time is not largely attributable to the illiberal character of its commercial legislation, and whether Italy, at any rate, is not unwise to discourage in this manner the introduction of foreign capital and foreign enterprise. For it must by this time be evident to every one but the most bigoted patriot, having any acquaintance with that country, that in spite of the boastful adage to the contrary, current during the first outburst of enthusiasm consequent upon the dawning of a new era, 'Italia *non* se farà da se.'

MALCOLM MCILWRAITH.

ACTIO PERSONALIS MORITUR CUM PERSONA IN THE LAW OF SCOTLAND.

THE principle of law embodied in this maxim has been recently examined in the Scots Courts in *Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859. Shortly stated, the plaintiff's action was for payment to him as Executor of his deceased wife of £500 in name of damage and *solatium*, or alternatively, to him as an individual, of a like sum, and was laid on the ground that his wife had been grossly maltreated by those in charge of her while she was an inmate of the defendant Institution—her death, indeed, which occurred while she was still insane, being alleged to be due to the ill-treatment she received. On the facts disclosed it was held that the plaintiff's wife's death was not due to the fault of the defendant's servants, and the plaintiff at the hearing of the appeal did not insist on his title to sue as an individual, but insisted that personal injury had been inflicted on his wife, and that he, as her Executor, had a title to sue for damages in respect thereof. The Lord Ordinary (Kincairney) being of opinion that the claim transmitted to the plaintiff as Executor, the First Division of the Court of Session appointed the case to be heard before seven Judges, on account of its difficulty and importance. The Lord President (Robertson), Lords Young, Adam, Mc Laren and Kinnear, were of opinion that an Executor has no title to raise and follow out an action of damages for personal injury inflicted on the deceased person he represents. The Lord Justice Clerk (Kingsburgh) and Lord Trayner dissented.

With deference, it is submitted that the opinion of the majority of the Court is erroneous, and regret must be felt by many jurists that this branch of Scots Law formerly in advance of, should have been brought into conformity with, the rule of the English Common Law, a rule at once barbarous and without plausible ground. The reasons assigned for the judgment by the majority of the Court in the case under consideration were—

(1) *That in England, the American States, France and elsewhere no such ground of action is recognized.* However desirable it may be to bring the Laws of England and Scotland into uniformity, this is no sufficient reason for forcing upon the laws of one country a rule which has nothing to recommend it. In a matter open to less

serious criticism the Scots Courts did not accept the English law of 'Common Employment' till it was thrust upon them by the House of Lords.

(2) *That there is no trace in the Books of the recognition of such a right, and that a more limited right is given to Executors, viz.:—the right to follow out and insist in an action which has been raised by the injured person himself.* The first part of this proposition is referred to afterwards, the second is not worth attention, except indeed as an argument for the position we are maintaining.

(3) *That the injured person may have had good reasons for not insisting in an action in view of the fact that his character, health, losses in business and the like would be subject to investigation, and that if he did not raise an action it should be denied to his Executor* ' who has sustained no injury, and who merely wishes to make money out of the suffering of the deceased, *per* Lord Mc Laren, p. 863.' In the present case this argument cannot apply, as the injured person was insane at the time when the alleged cause of action emerged, and died before being in a position to instruct an action to be raised, or even to appreciate that any right to recover damages had arisen to her. Take even a stronger case. Suppose that *A* inflicts such ill-treatment upon *B* that the latter becomes insane, and in course of, say, a few weeks dies from the result of *A*'s treatment, without regaining his reason. Is *A* to go free simply because his victim was rendered incapable of instructing his solicitor? A law which answers this in the affirmative is difficult to support.

But it is submitted that in Scotland the question was not open and that the case of *Auld* v. *Shairp*, Dec. 16, 1874, 2 R. 191 (approved of in *Wood* v. *Gray & Sons*, '92 A. C. 576, *per* Lord Watson p. 580), should have been followed in *Bern's Executor* v. *Montrose Asylum*. The case of *Auld* was raised by the Executrix (the widow) of Dr. Auld, who was for some time Classical Master in Madras College, St. Andrews, against the Principal of the United College at St. Andrews for damages in respect that the defendant by retaining a professorship, after obtaining an appointment as Principal, and by slanderous statements regarding the deceased had prevented the latter from being appointed to the Chair of Humanity. In that case, raised two years after Dr. Auld's death, the plaintiff undoubtedly alleged injury to herself, as well as to her husband, but the wrong done to her, if any, was an immediate consequence of the wrong done to Dr. Auld, and the only question raised was precisely the one raised in *Bern's case*. It was, however, upon this point of patrimonial loss that the majority of the Court distinguished the two cases. But are there grounds of distinction sufficient to enable the Court, with reason, to say that in the one

case we are to recognize the Executor's right to raise an action, in the other we are to deny it? Take the case of a slander—*par excellence* a personal injury. That may affect, and affect materially, the value of the personality. Imagine part of the estate to consist of the good-will of an old-established and prosperous private Bank, and that shortly before the sole partner's death an unfounded allegation has been made that his house is in financial difficulties. Is no action to lie in such a case as that?

It is not our object, however, to repeat the arguments which have been adduced, both in England and in Scotland, against the rule embodied in the maxim. Our object rather has been to note that in their zeal to assimilate the laws of the two countries, the Scots Courts have taken a retrograde step. Looking to the opinion of Lord Watson in *Wood's case* (*supra*) we are hopeful that if the point comes before the House of Lords in a Scots Appeal a return will be made to what we submit common sense demands, and Scots Law allowed, prior to *Bern's case*.

R. M. WILLIAMSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Referendum in America. By ELLIS P. OBERHOLTZER. Publications of the University of Pennsylvania, Philadelphia. 1893. 225 pp.

MR. OBERHOLTZER'S book is a most seasonable and a most important publication.

The book is seasonable because the Referendum or the 'People's Veto' occupies the attention of publicists throughout Europe, and will probably soon command the attention of the people of England.

The book is important because it contains a whole body of useful information about the nature and the operation of the people's veto in America.

Some of the results contained in or suggested by Mr. Oberholtzer's treatise may be summed up in the following statements.

First. The Referendum, though its name, which comes from Switzerland, is little known in the United States, is there an institution of indigenous growth and exists in one form or another in almost every State of the Union.

Secondly. The Referendum as practised in America is a merely negative exercise of popular authority. It is a veto, and moreover a veto on legislation. It has no connexion with the settlement of differences of opinion which may divide the two Chambers or Houses which constitute one legislative body. Whether in England the people's veto might or might not be employed to terminate conflicts between the House of Lords and the House of Commons is a matter on which in these pages it is unnecessary to express an opinion. All that need be said is that American constitutionalism affords no precedent for such employment.

Thirdly. The Referendum is at once a Democratic and Conservative institution. It is Democratic because it increases the power of the citizens by giving them a part in legislation, at any rate when it is legislation of a constitutional character. It is Conservative because whenever it is applied it increases instead of diminishing the checks on legislation.

Fourthly. The Referendum as it exists in the States of the Union is all but invariably applied to constitutional legislation, but it is also often applied in one shape or another to legislation which does not affect the constitution.

Fifthly. When the purely negative character of the Referendum is realized, an historical analogy suggests itself to which Mr. Oberholtzer does not, we think, call attention. The Referendum corresponds in modern Democratic constitutions to the veto of the Crown under the ancient constitution of England. The veto of the sovereign people is exactly analogous to the veto of the sovereign king.

Sixthly. The people's veto works satisfactorily and without any particular difficulty among the English people on the other side the Atlantic. In considering, however, its operation in America as a check on constitutional legislation, it is necessary to bear in mind that every American State has a written constitution, and that the Americans have either invented or acclimatized one of the most important pieces of legislative mechanism, namely the 'Constitutional Convention.' A. V. D.

The Principles of Pleading in Civil Actions under the Judicature Acts. With observations on indorsements on writs, trial without pleadings and other business preliminary to trial. By W. Blake Odgers, Q.C. Second Edition. London: Stevens & Sons, Lim. 1894. 8vo. xxxix and 315 pp. (10*s.* 6*d.*)

The appearance of a second edition of this useful handbook of practice, incorporating and explaining the New Rules of November 1893, will be warmly welcomed by the common law junior, the bulk of whose daily work is concerned with the subjects of which it treats.

The 55 pages which have been added to the first edition, consist mainly of the first three chapters, which deal respectively with 'Indorsement on Writ,' 'Procedure under Order XIV under New Rules,' and 'Proceeding to Trial without Pleadings.' Of these the second and third chapters are entirely new, while the first chapter is chapter vi. in the first edition in an enlarged and amplified form.

The working of the new system of trial without pleadings is made abundantly clear by twenty-four useful precedents. We do not agree with the author's suggestion on p. 33 that it would be well if cases of this class 'could be placed in the same special list' as actions in which leave to defend is given under O. XIV. Wills J., to whom the common law 'short cause' list has been assigned, has repeatedly protested against any but the shortest cases being placed in his list, while our author's precedents show that trial without pleadings is intended to be applicable to lengthy actions of tort of no real urgency, which have certainly no claim to priority over actions of commercial importance.

Dr. Odgers, at pp. 22, 23, shows his usual clearness in endeavouring to thread his way through the conflicting and unsatisfactory decisions as to how far a specially indorsed writ must set out all the material facts necessary to constitute a complete cause of action, according to the rules applicable to an ordinary statement of claim. Till this has been more clearly and definitely settled by judicial authority, we accept our author's view that *Fruhauf* v. *Grosvenor* (67 L.T. p. 351) 'is still the law.'

The volume before us has been enriched by the addition of some more valuable precedents, and the most recent decisions from every series of reports have been incorporated in the text. The saying that 'the young lawyer learns his law at the expense of his clients' has hitherto been especially true as to questions of practice. The book before us, however, goes far towards providing the same royal road to a knowledge of practice, which so many excellent text-books have during the last twenty years furnished to a knowledge of substantive law. It supplies a distinct and long-felt want for those who are seriously endeavouring to make the practice of the law their profession. S. H. L.

The Principles of the Law of Evidence. By W. M. Best. Eighth Edition. By J. M. Lely. *With Notes to American and Canadian Cases.* By Charles F. Chamberlayne of the Boston Bar. London: Sweet & Maxwell, Lim. Boston: The Boston Book Co. 1893.

The eighth edition of Best on Evidence appears eleven years after the second. This seems to indicate a steady demand for it, explicable by the fact that it is more coherently written, much more of a book and less of a dictionary, than the standard work of Taylor, and that Stephen's Digest, and the various works more or less modelled upon it, require a great deal of labour to be rightly apprehended by the conscientious student. Best is a good book for a person to read who comes fresh to the study of the Principles of Evidence. Decisions upon points of evidence are less frequent now than in the days of special pleading, and thus it is not unnatural that the more important part of the new matter in the present edition is concerned with statutes, of which the application is largely to the Criminal Law. With reference to the cases in which young children are permitted to give evidence not upon oath, we have sought in vain for any mention of the Prevention of Cruelty to Children Act, but inasmuch as the book contains no index to statutes it may be rash to say positively that there is none. Upon the more important subjects of the competence to give evidence of accused persons and their wives or husbands, Mr. Lely, the present editor, is betrayed into one or two errors of fact. Thus he says that 'the Criminal Law Amendment Act of 1885 affords the only instance of an accused person being enabled to give evidence on a charge of felony.' This is inaccurate, as there is another instance in s. 4 of the Explosive Substances Act 1883 (46 Vict. c. 3, s. 4). The reason of this particular proviso, however, was probably less the general view of the subject now widely taken, than the fact that this section throws upon the accused the *onus* of proving that his possession of explosives is lawful, as by the ordinary principles of law it would be presumed to be. Mr. Lely thinks that the 'authority in favour of an alteration of the law' whereby all accused persons should be competent witnesses, 'is now so great that it would be waste of time to controvert it.' No doubt the preponderance of such authority is great, but it consists largely of the opinions of men like the late and present Lord Chancellors and the Master of the Rolls, who have had far less opportunity than some of their colleagues of observing personally the practical working of the rule of competence. It would be highly desirable to obtain full statements on the point from the judges of the Queen's Bench Division who have been presiding in Crown Courts for the last six or seven years, and if this were done some conscientious advocates of reform might be considerably surprised. An interesting and rather well-executed feature of this edition is the 'American Notes' added by Mr. Chamberlayne, of the Boston Bar, at the end of each chapter, touching the American and Canadian cases that have been quoted. We could wish that the radically false and misleading distinction between so-called 'direct' and so-called 'circumstantial' evidence had been excised, but perhaps that would, in the editor's judgment, have been taking too great a liberty with the original text, excused as the blunder is by the example of Bentham, and other writers who ought to have known better. We are glad to note that though the book has been printed, for copyright purposes, in America, the spelling is in accordance with English rules.

The Law of Executors and Administrators. By Sir Edward Vaughan Williams. Ninth Edition, by the Hon. Sir Roland L. Vaughan Williams, Knt. In two vols. cxvi and 2131 pp. La. 8vo. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1893. (£3 18*s.*)

The new edition of 'Williams on Executors' deserves the highest compliment which it is in our power to pay it. It has been constantly used during some four busy months and it has never been found wanting. It is a book which has a great reputation to sustain. Probably there is no text-book which is in constant use both in the Temple and in Lincoln's Inn stands higher. And the ninth edition does nothing to detract from that reputation. It is a quarter of a century since the last edition by Sir Edward Vaughan Williams was issued. Since then the book has been in the hands of Mr. Justice Vaughan Williams and his late brother—*hereditas paterna et fraterna*—the Judge is now solely responsible. One hardly likes to think how many Acts have been passed or how many cases decided since 1868 which must needs be incorporated in the book to bring it up to date. To do this and yet maintain the text of the original is a task the difficulty of which can only be realized by those who have tried it. Upon a single point only have we found a joint—not loose but—insufficiently strong in the Vaughan-Williams harness. There is a familiar paragraph in the text which reproduces the rule laid down in 1858 by *Whicker* v. *Hume* (7 H. L. Cas. 124) as to the law of the place of domicil deciding the validity of a will. Upon the formal validity of a will as distinguished from its material validity a change was made in 1861 by Lord Kingsdown's Act, 24 & 25 Vict. c. 114. It is hardly enough to warn the reader of this change in the law by a mere 'See however' in a note. This *sed vide* should have been limited by the character of the Act. The real use of a text-book is however as a hunting-ground, and no lawyer ought to pass by such a reference as this to an Act of Parliament without reading the Act for himself. One other quarrel we have with the book, and that is an inevitable quarrel with the length of the 'Addenda and Corrigenda' caused by the interval which elapsed between the time of the work leaving the hands of Mr. Justice Vaughan Williams and the date of publication. Apart from these things, and they are small things, the ninth edition of 'Williams on Executors' is as good and as carefully edited a text-book as there is to be found among the tools of a lawyer's trade.

A Treatise on the Law of Partnership. By the Right Hon. Sir Nathaniel Lindley. Sixth Edition. By Walter B. Lindley; with an Appendix on the Law of Scotland, by J. Campbell Lorimer. London: Sweet & Maxwell, Lim. 1893. La. 8vo. lxii and 939 pp.

The passing of the Partnership Act, 1890, has made it necessary to alter the form of Lord Justice Lindley's well-known treatise to some extent. Equity lawyers need not be told that, as the Partnership Act was in almost all respects a purely codifying Act, any material discrepancy of substance between this standard text-book and the Act would go to show that the Act had so far failed of its purpose. But we are not aware of any such. We commend to law reformers the introductory remarks on codification. Lord Justice Lindley points out—adding the great weight of his authority and experience to opinions already expressed by others to the same effect—that

the difficulty of codification lies much more with the awkward form of our legislative machinery than with the subject-matter in itself. 'It is matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are; but no doubt one explanation of this state of things is the hopelessness of passing through Parliament without mutilation any carefully considered exposition of any great branch of law.'

Practising lawyers will regret that the learned author and editor continue to give references only to the Law Reports for current cases.

Mr. Campbell Lorimer's appendix of notes on the Scots law of partnership with reference to the Act is a new feature, and ought to add to the usefulness of the book.

The Sale of Goods Act, 1893. With Notes. By FRANK NEWBOLT. London: Sweet & Maxwell, Lim. 8vo. xiv and 181 pp.

THE promptitude with which Mr. Newbolt has brought out a working edition of this Act does not seem to have prevented him from making it accurate and, so far as important English decisions are concerned, comprehensive enough for all practical purposes. We think it would have been an improvement to notice the decision of the Supreme Court of the United States in *Norrington* v. *Wright*, which will certainly have to be considered by our Courts when they deal again with the vexed question of the effect of failure in delivering one or more out of several instalments of goods contracted for. This question is purposely left by the Act (ss. 10, 31) where the existing English authorities leave it.

The comment on s. 4 (= s. 17 of the Statute of Frauds) is wisely made very short. We trust that not many members of the profession are in need of the explanation that 'the Statute of Frauds'—which was passed by the English Parliament many years before the Union—'did not apply to Scotland.'

If Mr. Newbolt intends his handbook to be used by business men as well as lawyers, he may find it desirable in a future edition to be a little more discursive for the benefit of the lay people, on such matters, for example, as the distinction between *condition* and *warranty*.

The Law of Bankruptcy. Seventh Edition. By GEORGE YOUNG ROBSON. London: William Clowes & Sons, Lim. 1894. 8vo. lxii and 1310 pp. (38*s*.)

As a thorough treatise on bankruptcy law, remarkable for a clear elucidation of principles, Mr. Robson's work has long been held in high estimation. A new edition bringing up the work to date will be a welcome guest in a complete law library.

Mr. Robson's book, well thought out and arranged at the outset, has, in successive editions, embodied the changes introduced by legislation during a period of thirty years, while constantly keeping in view the relation of later Acts to the principles established under former ones. In the fifth and sixth editions the important changes of the Act of 1883 were incorporated, and a crowd of cases following upon the Bills of Sale Act of 1882 were dealt with.

In the present (seventh) edition the changes made by the Bankruptcy Act, 1890 are incorporated, as well as the provisions of the Act of 1887 for discharge of bankrupts and closure of bankruptcies under former Acts. The

Bills of Sale Acts 1878 and 1882, with the decisions under them, are separated from the rest of the work, and treated by themselves in the concluding chapter. The list of cited cases—notwithstanding the omission of many obsolete cases under former Acts—amounts to between 5000 and 6000.

The list of *addenda* and *corrigenda*, consisting of nearly two pages of close print, looks, at first sight, large. The *addenda* consisting of cases from the later reports of 1893 are doubtless inevitable; but some of the *corrigenda* might perhaps have been rendered unnecessary by exact care in a final revision of the copy, as, for instance, at p. 816, where a section of the Debtors Act, 1869 is set forth, which is clearly spent and has been formally repealed by S. L. R. 1883. This is, however, a small blemish in an edition which, on the whole, maintains the character of careful execution which has marked Mr. Robson's book throughout, and now presents a result of accumulated and well-directed industry, assuring its position as an established standard.

R. C.

The Law and Practice of Bankruptcy. By the Hon. Sir Roland L. Vaughan-Williams. Sixth Edition. By E. W. Hansell. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1894. La. 8vo. lxxxviii and 896 pp. (25*s.*)

In the preface to his work on Specific Performance, Fry L.J. combats the notion that books written or revised by authors on the bench possess a quasi-judicial authority, and Kekewich J. in *Union Bank* v. *Munster* (37 Ch. D. 51, 54) judicially confirms this view. Such books, however, certainly enjoy a superior degree of extra-judicial esteem in the profession. 'Williams on Bankruptcy,' having made its reputation long before the author was raised to the Bench, fully deserves the promotion it now receives. Opinions may differ, do differ as to whether a subject like Bankruptcy, largely statutory but with a vast accretion of case law, is best treated under titles or sections; our own preference is for titles, but sections are probably more popular. It is significant, however, that even in the treatment which we have here by sections, what are in form annotations really expand into titles or treatises; for instance the notes on s. 4 (acts of bankruptcy), s. 44 (property of bankrupt divisible among his creditors), or ss. 37, 40 (proof and priority of debts). In this way the two methods meet. The index is excellent, the cases are dated and references are given to several sets of reports. He must be an exacting person who could wish for a better book than this.

The Mark in Europe and America: a Review of the Discussion on Early Land Tenure. By Enoch A. Bryan. Boston, U.S.A.: Ginn & Co. 1893. Sm. 8vo. vi and 164 pp.

Mr. Bryan's survey is from the point of view, which we suppose must now be called the fashionable one, of those who conceive Mr. Seebohm and Fustel de Coulanges to have demolished something called the 'mark theory.' That theory, in its complete dogmatic form, was never really maintained by any writer of repute, except perhaps Emile de Laveleye; but no doubt it was exaggerated, from twenty to ten or twelve years ago, in much second-hand teaching and writing, as Mr. Seebohm's and Fustel's work not improbably will be for the next dozen or score of years. And, as it has recently started up again, without any kind of critical qualification, in Mr. Shaw-Lefevre's otherwise careful and meritorious book on 'English

Commons and Forests,' we cannot say that the needful business of correction is wholly done. When Mr. Bryan explains how little real evidence there is for historical survival of the Germanic 'mark' in American townships, he contributes a definite and useful element to the discussion. Otherwise we think that Dr. Andrews's 'Old English Manor,' as it is certainly a fuller guide than this little book, is also a safer one. No one admires Fustel de Coulanges' brilliant qualities more than we do. But we must really remind those who go about to conjure with his name in early English economic and legal history that Fustel had, to all appearance, never read a single English document. If he had, his views on one or two Continental problems might possibly have been more or less modified. See further Dr. Andrews's remarks on this work in the *Political Science Quarterly* for March. F. P.

Cases and Opinions on International Law, with Notes and a Syllabus. By FREEMAN SNOW. Boston: The Boston Book Company. 1893. 8vo. xl and 586 pp.

The author, in applying the 'case system' to the teaching of International Law at Harvard, felt the need of some compendious collection of cases, which might be handled by his students. Hence the work before us, which is an improvement in several ways upon what has hitherto been the only book of the sort in the English language, the 'Leading Cases' of Mr. Pitt-Cobbett. The later is upon a considerably larger scale than the earlier work, from which it differs in giving the decisions of the courts textually, rather than by way of abridgement, and in being confined almost exclusively to cases which have been the subject of actual litigation. In this respect Mr. Snow's work differs also from the *Causes Célèbres* of G. F. Martens, the *Causes Célèbres du Droit Maritime* of De Cussy, and Wharton's *Digest of International Law*, which are all occupied with diplomatic, rather than with forensic, discussions. By a wholesome innovation upon the haphazard arrangement of 'Leading Cases' of which Mr. J. W. Smith's well-known book set the example, Mr. Snow's cases, like those of Mr. Pitt-Cobbett, are distributed under appropriate headings, in accordance with a methodical grouping of the whole subject.

The cases are well chosen, with a not unnatural leaning to American decisions, adequately set out, and helpfully annotated. The author shows no undue national bias, as will appear from his remarks upon Barundia's case, Cutting's case, and the Behring Sea controversy. He might perhaps with advantage have devoted more space to the rights and duties of belligerents *inter se*; and would perhaps have done well to indicate in some way, upon the face of such cases as *Wolf* v. *Oxholm* and *Church* v. *Hubbart*, their doubtful authority.

The body of the work is preceded by a 'Syllabus' of topics, well grouped under 195 headings, with references under each to the revelant passages in the text-books. It is followed by an appendix of useful documents, such as Lieber's Instructions, and the War Manual of the Institute of International Law.

Abstract of Reported Cases relating to Trade Marks (between the years 1876 and 1892 inclusive), with the Statute and Rules. By JAMES AUSTEN-CARTMELL. London: Sweet & Maxwell, Lim. 8vo. xviii and 417 pp.

A NEW book on the subject of Trade Marks might justify its appearance on the ground of its being a useful text-book or a digest in which every

point of law as yet decided in this connexion could be easily referred to; but we cannot congratulate the author of the present volume on having fulfilled either of these conditions very satisfactorily. Considered as a text-book, it contains no attempt at editing nor any preface from which the reader might gather a general idea of the history of the law on the subject. As a digest, the book suffers from the want of classification—the arrangement of cases being merely alphabetical, which is perhaps the least useful system to adopt. As a digest, moreover, the work is not sufficiently full, though the author, it is true, in the Preface limits its scope to presenting in a convenient form the salient portions of reported cases decided between 1876 and the end of 1892. Marginal notes again would have been useful to catch the eye, and the headnote given in each case is hardly sufficient as a summary of its main features. To condense a judgment is a work of some difficulty, and in the present instance the reader is liable to be misled owing to the occasional capricious omission of the asterisks which are employed in the text to denote where a word or sentence has been left out. The text is moreover not always faithfully transcribed, as for instance, in the extract from the judgment of Lord Justice Cotton on page 65, where the words 'discretion to register,' should be 'discretion to refuse to register.' A copious and correct index to some extent redeems the want of classification in the subject-matter.

A Handbook of Husband and Wife according to the Law of Scotland. By Frederick Parker Walton. Edinburgh: William Green & Sons. 1890. 8vo. lxxii and 510 pp.

The author of this book has rendered the task of the reviewer very difficult by making the confession that he was the author of the delightful little book 'Marriages Regular and Irregular,' reviewed in L. Q. R. ix. 291. By this confession he leads us to expect a high standard of excellence, and we have not been disappointed. One important feature in the book before us is the freedom with which the author cites English cases; he defends, we think successfully, this practice in the preface, citing *Collins* v. *Collins*, 11 R. H. L. at p. 23 (S. C. 11 App. Ca. at p. 230). Some of the most interesting parts of this book to an English lawyer are the discussions of domicile, capacity to marry, and the essentials of marriage. The chapter on 'Jus Mariti' may be studied with advantage by every lawyer who is preparing a settlement on the marriage of an Englishwoman with a domiciled Scotchman. There is a most interesting discussion at p. 79 as to whether a marriage celebrated *in facie ecclesiae* can be set aside for want of consent. The author is of opinion that 'a case might arise in which a regular marriage should be set aside on this ground. Marriages celebrated *in facie ecclesiae* have been frequently avoided on the ground of force, fraud, or error—and these are only different ways of proving want of mutual consent.'

On the whole we cordially commend this book to the attention of our readers, both Scotch and English, and we venture to predict that it will be successful.

We have also received:—

Commercial Law: an Elementary Text-Book for Commercial Classes. By J. E. C. Munro. London: Macmillan & Co. 1893. 8vo. viii and 191 pp. (3*s.* 6*d.*)—This book is published as one of a series of elementary commercial class-books. It will be useful not only as a book for students preparing for

the examinations now held or recommended by various authorities on commercial education, but also as an elementary hand-book of commercial law for persons engaged in business.

The matter is well selected and the arrangement intelligible. There are four parts. The *first* part contains a brief enumeration of the mercantile persons and mercantile property treated of. In the *second* part, contracts are treated with relation to general principles: (1) how contracts are made, (2) what persons are capable of contracting, (3) the form of and consideration for contracts, (4) what if the contract is illegal, or (5) its performance impossible, (6) consequences of mistake or fraud, (7) the transmission of rights and liabilities, and (8) performance breach and discharge. The *third* part treats specially of the leading commercial contracts: (1) Partnership, (2) Principal and agent, (3) Sale of goods, (4) Insurance, (5) Guarantees, (6) Charter-parties and Bills of lading, and (7) Bills, Cheques, Promissory notes, and I.O.U.'s. The *fourth* part contains a very brief account of the principles of bankruptcy law. And the *fifth* part treats of 'the application of law.' That is to say, by the law of what country is a particular question to be determined?

The style is clear and concise; and it is refreshing, even to a lawyer, to see well-known principles stated briefly, stripped of the modifications of special and exceptional circumstance, and without the inevitable reference of the text-books to *Buddle* v. *Muddle*, 9 T.R. 1000.

If the book comes into general use for educational purposes, its commercial success will be well deserved. R.C.

Les Waréchaix: étude de droit foncier ancien. Par PAUL ERRERA. Bruxelles: Alfred Vromant & Cie, 1894. 8vo. 35 pp.—In Flemish and Low German 8th–10th century documents, *watriscapium* and other variant forms doubtless mean some sort of easement *ejusdem generis* with the universal 'aquis aquarumve decursibus' of Romano-Germanic conveyancing. But from the 13th century onwards we find *warescapium*, etc. (in modern French orthography *waréchaix*) meaning not an easement but a subject of easements or common rights, and not necessarily connected with water. In fact 'common lands' would generally be a proper English rendering. M. Errera thinks this is a different word going back to *war*, *were*. The rights of lords and tenants in these lands appear as more or less unsettled, but it seems clear that the lord and the tenants together could do as they pleased with them. In modern times the courts do not seem to have worked out any definite theory of their legal position. M. Errera's introductory paragraph contains a significant correction of theories lately (perhaps still in some quarters) current as to archaic notions of property. 'Le domaine collectif *où plutôt le sol non encore approprié en certaines parties*, telle est la caractéristique de cet état de choses.' We quite agree.

The Trustee Act, 1893, with Explanatory Notes and Forms. By A. R. RUDALL and J. W. GREIG. London: Jordan & Sons. 1894. 8vo. xxxii and 232 pp. (6*s.* net.)—This is a useful and carefully worked-out little book on the new Act. The schedule in Appendix I, showing the sections of the Act and the sections to which they correspond in the repealed Acts and the sections of the latter Acts which are still unrepealed, is especially useful. The Rules of the Supreme Court (Trustee Act) 1893 were published whilst this book was passing through the press, and, with the forms forming Appendix K to the Rules of the Supreme Court, November, 1893, are set out *in extenso* at the end; but in a second edition they will no doubt receive the specific

explanation in connexion with the clauses of the Act, which they seem to us to require. For example, does O. LV. R. 13 A (c) enable an application for a vesting order under clause 31 of the Act to be made by summons, the word 'judgment' only being used in that clause?

A Digest of Civil Law for the Punjab, chiefly based on the Customary Law as at present judicially ascertained. By W. H. RATTIGAN. Fourth Edition. Allahabad: Pioneer Press. 1893. 8vo. xii, 177, and xxxi pp.—The fact that Dr. Rattigan's digest of Panjáb law is both meritorious and of great practical utility does not by any means prove that it would be wise or safe for the Government of India to charge itself with codifying Asiatic customs. Mr. Bogišić, in a much smaller, and one would think a safer field of experiment, deliberately left the law of the family out of the code of property law which he drafted for the Principality of Montenegro, and which has now been in force there for some years. Does Dr. Rattigan think the customs of mixed races and religions in the Panjáb a lighter thing to meddle with than those of uniformly Orthodox Slavs? Therefore we wish, contrary to Dr. Rattigan's expressed aspirations, that he may enjoy the honour and profit of many more editions of his Digest before there is any talk of turning it into an authoritative Code.

The Institutes of Justinian illustrated by English Law. By JAMES WILLIAMS. Second Edition. London: W. Clowes & Sons, Lim. 1893. 8vo. xx and 351 pp. (7*s.* 6*d.*)—This book seems intended for the use of students of Roman law who take up the Institutes after having made some acquaintance with English law. We should think it more embarrassing than useful to a learner who takes his Roman law first to try to pick up English law *pari passu* with his Institutes by means of a series of comparative notes. That some one does find the book useful is proved, however, by this being the second edition. Mr. Williams's statements of English law seem to be as generally accurate as can be expected, having regard to their brief and elementary character. It would have been better to quote less freely and with more critical discretion from unauthoritative text-books of both Roman and English law, and we do not think the latest editions have always been used.

On the Nature of State Interference. By HORACE SEAL. London: Williams & Norgate. [1893]. 8vo. viii and 96 pp.—In nature everything interferes with everything else, and only the very lowest individuals can be called individualist. Therefore increasing State interference in human society is part of a necessary and beneficent evolution. Such is the nearest approach we can make to a consecutive head-note for this little book. It is wonderfully desultory for its size, but a clever book withal; and it may well be found stimulating, which in speculative politics is the most that can be expected of any book short of a masterpiece. Its connexion with the Faculty of Law is somewhat remote: hence the brevity of this notice.

Social Evolution. By BENJAMIN KIDD. London: Macmillan & Co. 1894. 8vo. vi and 348 pp.—We have not had time to verify how far Mr. Kidd's book touches on the theory of legislation or any other topic properly within the province of law. One of his main points, apparently the central one, is that no rational proof can be given to the individual that his interest coincides with that of society, and this because in fact it does not. If this be so, law must of course be conceived not as a temporary but as a permanent and necessary constituent of social life. Mr. Kidd has some good critical points: thus he perceives that Mr. Herbert Spencer's political

philosophy is in essentials pure individualism. The book seems remarkable and likely to be fruitful.

The Statutes of Practical Utility . . . passed in 56 & 57 Vict. (1893), *alphabetically arranged, with notes thereon, and a copious Index.* By J. M. LELY and W. F. CRAIES. Vol. III. Part 3. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. 8vo. 599–747 pp. (*10s. 6d.*)

A Treatise on Stock and Stockholders, Bonds, Mortgages, and General Corporation Law. By WILLIAM W. COOK. Third Edition. Two vols. Chicago: Callaghan & Co. London: Kegan Paul, Trench, Trübner & Co., Lim. 1894. La. 8vo. cevii and 2068 pp.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XIII. 1811–1815. (2 & 3 Vesey & Beames—19 Ves.—14 & 15 East—4 Taunt.—3 Camp.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1894. La. 8vo. xvi and 842 pp. (*25s.*)

Index of Cases commented upon in judgments in the Court of Session and in Scottish Appeals to the House of Lords, 1862–1893. By P. J. HAMILTON GRIERSON. Edinburgh: W. Green & Sons. 1894. La. 8vo. vii and 473 pp.

Five Years' Railway Cases, 1889–1893 . . . *being a supplement to Railway Rights and Duties.* By JAMES FERGUSON. Edinburgh: W. Green & Sons. 1894. 8vo. viii and 124 pp.

The Annual County Courts Practice, 1894. By His Honour Judge HEYWOOD. Two Volumes. London; Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. 8vo. xxxii and 946, xiv and 438 pp. (*25s.*)

Les lois sociologiques. Par GUILLAUME DE GREEF. Paris: Félix Alcan. 1893. 8vo. 181 pp. (2 fr. 50).

Outlines of the Law of Torts. By R. RINGWOOD. Second Edition. London: Stevens & Haynes. 1894. 8vo. xli and 253 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
